GOVERNMENT LITIGATION SAVINGS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 1996

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TUESDAY, OCTOBER 11, 2011

GOVERNMENT LITIGATION SAVINGS ACT

TUESDAY, OCTOBER 11, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 3:35 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, and Cohen.

Also Present: Representatives Conyers and Lummis.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; John Hilton, Counsel; Johnny Mautz, Counsel; Ashley Lewis, Clerk; (Minority) Norberto Salinas, Counsel; and James Park, Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee will come to order. I will give my opening statement, and then I will recognize the distinguished gentleman from Michigan.

We are a litigious society. One tactic often used by some plaintiffs with deep pockets but weak legal claims is to sue anyway and then drag out the litigation as long as possible. Sooner or later many defendants will realize that it is cheaper or less expensive to settle rather than enjoy the hollow victory of winning in court by breaking the bank. And no one has deeper pockets than the Federal Government. If it runs out of money, it simply prints more. The Federal Government literally has thousands of attorneys permanently on staff, so no person or corporation could ever hope to compete with such overwhelming resources.

Recognizing this, in 1980 the Congress adopted the Equal Access to Justice Act to help small businesses and ordinary people vindicate their rights in litigation against the Federal Government. When the government loses in court, the Equal Access to Justice Act allows a court to order the government to pay the other side's attorneys fees and costs when the government's legal claim was not substantially justified. For this reason, the EAJA has been called the anti-bully law.

Experience over the past 30 years, however, has revealed a number of shortcomings in the EAJA, which is what we are here to discuss today. Mrs. Lummis, our colleague from Wyoming, has been pursuing this issue for some time now, and I want to acknowledge her efforts in this regard. Her bill, H.R. 1996, the "Government

Litigation Savings Act," proposes several reforms to the EAJA. First is the lack of transparency. The EAJA formerly required the Chairman of the Administrative Conference of the United States and the Attorney General to file annual reports with Congress stating how much the Federal Government was paying out, but the conference lost its funding in 1995 and is only just now getting back on its feet, and the Attorney General's reporting requirement was repealed altogether in 1995. The bottom line is, there has been no government-wide accounting of EAJA payments since fiscal year 1994. We don't know how much money is going out the door, we don't know if the EAJA is helping those for whom it was created to help; that is, ordinary Americans and small businesses. Fixing this lack of transparency is something I hope we can agree upon.

Related to the question of who is benefiting from EAJA is the eligibility exception for nonprofit 501(c)(3) organizations. It is not altogether clear why this exception was included in the original law, but it is clear from a recent GAO audit that it benefits certain well-heeled environmental groups who use litigation as a strategy to advance their ideological agenda. Whether a multimillion-dollar organization that already is tax exempt should have the added benefit of being able to collect attorneys fees and costs from the Federal Government, which originally of course comes from the American taxpayers, is another issue which our witnesses I am sure will address.

H.R. 1996 also would reform the special factor exception; that is, the $125 per hour cap on attorneys fees. Because of the lack of annual reporting, this evidence is anecdotal, but it appears that some courts interpret this exception very loosely. If the exception has become so large that it swallows the rule, why bother capping the attorneys fees at all? H.R. 1996 would abolish this special factor exception.

Finally, in many parts of the country a good lawyer, the kind you would want to hire if the Federal Government was on the other side, costs in excess of $125 per hour. H.R. 1996 proposes to fix this by raising the cap to $175 per hour and allowing it to be adjusted annually based upon the consumer price index.

In closing, I want to thank Mrs. Lummis for her dedication to the issue. H.R. 1996 deserves careful and serious consideration, and I look forward to the witnesses' testimony and reserve the balance of my time.

[The bill, H.R. 1996, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 1996

To amend titles 5 and 28, United States Code, with respect to the award of fees and other expenses in cases brought against agencies of the United States, to require the Administrative Conference of the United States to compile, and make publically available, certain data relating to the Equal Access to Justice Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 25, 2011

Mrs. LUMMIS (for herself, Mr. BISHOP of Utah, Mr. THOMPSON of Pennsylvania, Mr. SIMPSON, Mr. CHAFFETZ, Mr. YOUNG of Alaska, Mr. TIPTON, Mr. DENHAM, Mr. CONAWAY, Mr. REHBERG, Mr. COFFMAN of Colorado, Mr. FRANKS of Arizona, Mr. NUNES, Mrs. NOEM, Mr. LAMBORN, Mr. DUNCAN of Tennessee, Mr. PEARCE, Mr. HERGER, and Mr. FLAKE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend titles 5 and 28, United States Code, with respect to the award of fees and other expenses in cases brought against agencies of the United States, to require the Administrative Conference of the United States to compile, and make publically available, certain data relating to the Equal Access to Justice Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Government Litigation Savings Act".

SEC. 2. MODIFICATION OF EQUAL ACCESS TO JUSTICE PROVISIONS.

(a) AGENCY PROCEEDINGS.—

(1) ELIGIBILITY PARTIES; ATTORNEY FEES.—Section 504 of title 5, United States Code, is amended—

(A) in subsection (a)(1), by inserting after "prevailing party" the following: "who has a direct and personal monetary interest in the adjudication, including because of personal injury, property damage, or unpaid agency disbursement,"; and

(B) in subsection (b)(1)—

(i) in subparagraph (A)(ii), by striking "$125 per hour" and all that follows through "a higher fee" and inserting "$175 per hour"; and

(ii) in subparagraph (B), by striking "; except that" and all that follows through "section 601".

(2) REDUCTION OR DENIAL OF AWARDS.—Section 504(a)(3) of title 5, United States Code, is amended in the first sentence—

(A) by striking "may reduce the amount to be awarded, or deny an award," and inserting "shall reduce the amount to be awarded, or deny an award, commensurate with pro bono hours and related fees and expenses, or";

(B) by striking "unduly and"; and

(C) by striking "controversy." and inserting "controversy or acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith.".

(3) LIMITATION ON AWARDS.—Section 504(a) of title 5, United States Code, is amended by adding at the end the following:

"(5) A party may not receive an award of fees and other expenses under this section—

"(A) in excess of $200,000 in any single adversary adjudication, or

"(B) for more than 3 adversary adjudications initiated in the same calendar year,

unless the adjudicative officer of the agency determines that an award exceeding such limits is required to avoid severe and unjust harm to the prevailing party.".

(4) REPORTING IN AGENCY ADJUDICATIONS.—Section 504 of such title is amended—

(A) in subsection (c)(1), by striking ", United States Code"; and

(B) by striking subsection (e) and inserting the following:

"(e)(1) The Chairman of the Administrative Conference of the United States shall issue an annual, online report to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the nature of and claims involved in each controversy (including the law under which the controversy arose), and any other relevant information that may aid the Congress in evaluating the scope and impact of such awards. The report shall be made available to the public online, and contain a searchable database of the total awards given, and the total number of applications for the award of fees and other expenses that were filed, defended, and heard, and shall include, with respect to each such application, the following:

"(A) The name of the party seeking the award of fees and other expenses.

"(B) The agency to which the application for the award was made.

"(C) The names of the administrative law judges in the adversary adjudication that is the subject of the application.

"(D) The disposition of the application, including any appeal of action taken on the application.

"(E) The amount of each award.

"(F) The hourly rates of expert witnesses stated in the application that was awarded.

"(G) With respect to each award of fees and other expenses, the basis for the finding that the position of the agency concerned was not substantially justified.

"(2)(A) The report under paragraph (1) shall cover payments of fees and other expenses under this section that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is otherwise subject to nondisclosure provisions.

"(B) The disclosure of fees and other expenses required under subparagraph (A) does not affect any other information that is subject to nondisclosure provisions in the settlement agreement.".

(5) ADJUSTMENT OF ATTORNEY FEES.—Section 504 of such title is amended by adding at the end the following:

"(g) The Director of the Office of Management and Budget may adjust the maximum hourly fee set forth in subsection (b)(1)(A)(ii) for the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, to reflect changes in the Consumer Price Index, as determined by the Secretary of Labor.".

(b) COURT CASES.—

(1) ELIGIBILITY PARTIES; ATTORNEY FEES; LIMITATION ON AWARDS.—Section 2412(d) of title 28, United States Code, is amended—

(A) in paragraph (1)—

(i) in subparagraph (A)—

(I) by striking "in any civil action" and all that follows through "jurisdiction of that action" and inserting "in the civil action"; and

(II) by striking "shall award to a prevailing party other than the United States" and inserting the following: ", in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, shall award

to a prevailing party who has a direct and personal monetary interest in the civil action, including because of personal injury, property damage, or unpaid agency disbursement, other than the United States,''; and

(ii) by adding at the end the following:

''(E) An individual or entity may not receive an award of fees and other expenses under this subsection in excess of—

''(i) $200,000 in any single civil action, or

''(ii) for more than 3 civil actions initiated in the same calendar year,

unless the presiding judge determines that an award exceeding such limits is required to avoid severe and unjust harm to the prevailing party.'';

(B) in paragraph (2)—

(i) in subparagraph (A)(ii), by striking ''$125 per hour'' and all that follows through ''a higher fee'' and inserting ''$175 per hour''; and

(ii) in subparagraph (B), by striking ''; except that'' and all that follows through ''section 601''.

(2) REDUCTION OR DENIAL OF AWARDS.—Section 2412(d)(1)(C) of title 28, United States Code, is amended—

(A) by striking ", in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award," and inserting "shall reduce the amount to be awarded under this subsection, or deny an award, commensurate with pro bono hours and related fees and expenses, or";

(B) by striking "unduly and"; and

(C) by striking "controversy." and inserting "controversy or acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith.".

(3) ADJUSTMENT OF ATTORNEY FEES.—Section 2412(d) of title 28, United States Code, is amended by adding at the end the following:

"(5) The Director of the Office of Management and Budget may adjust the maximum hourly fee set forth in paragraph (2)(A)(ii) for the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, to reflect changes in the Consumer Price Index, as determined by the Secretary of Labor.".

(4) REPORTING.—Section 2412(d) of title 28, United States Code, is further amended by adding at the end the following:

"(6)(A) The Chairman of the Administrative Conference of the United States shall issue an annual, online report to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the nature of and claims involved in each controversy (including the law under which the controversy arose), and any other relevant information that may aid the Congress in evaluating the scope and impact of such awards. The report shall be made available to the public online and shall contain a searchable database of total awards given and the total number of cases filed, defended, or heard, and shall include with respect to each such case the following:

"(i) The name of the party seeking the award of fees and other expenses in the case.

"(ii) The district court hearing the case.

"(iii) The names of the presiding judges in the case.

"(iv) The agency involved in the case.

"(v) The disposition of the application for fees and other expenses, including any appeal of action taken on the application.

"(vi) The amount of each award.

"(vii) The hourly rates of expert witnesses stated in the application that was awarded.

"(viii) With respect to each award of fees and other expenses, the basis for the finding that the position of the agency concerned was not substantially justified.

"(B)(i) The report under subparagraph (A) shall cover payments of fees and other expenses under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is otherwise subject to nondisclosure provisions.

"(ii) The disclosure of fees and other expenses required under clause (i) does not affect any other information that is subject to nondisclosure provisions in the settlement agreement.

"(C) The Chairman of the Administrative Conference shall include in the annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report—

"(i) any amounts paid from section 1304 of title 31 for a judgment in the case;

"(ii) the amount of the award of fees and other expenses; and

"(iii) the statute under which the plaintiff filed suit.

"(D) The Attorney General of the United States shall provide to the Chairman of the Administrative Conference of the United States such information as the Chairman requests to carry out this paragraph.".

(c) EFFECTIVE DATE.—

(1) MODIFICATIONS TO PROCEDURES.—The amendments made by—

(A) paragraphs (1), (2), and (3) of subsection (a) shall apply with respect to adversary adjudications commenced on or after the date of the enactment of this Act; and

(B) paragraphs (1) and (2) of subsection (b) shall apply with respect to civil actions commenced on or after such date of enactment.

(2) REPORTING.—The amendments made by paragraphs (4) and (5) of subsection (a) and by paragraphs (3) and (4) of subsection (b) shall take effect on the date of the enactment of this Act.

SEC. 3. GAO STUDY.

Not later than 30 days after the date of the enactment of this Act, the Comptroller General shall commence

an audit of the implementation of the Equal Access to Justice Act for the years 1995 through the end of the calendar year in which this Act is enacted. The Comptroller General shall, not later than 1 year after the end of the calendar year in which this Act is enacted, complete such audit and submit to the Congress a report on the results of the audit.

○

Mr. COBLE. I am now pleased to recognize the distinguished gentleman from Michigan, Mr. John Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I am happy to be with you to form a quorum so that we could hold this hearing this afternoon, and I wanted to just go over some materials here to make sure I understand what it is we are doing, because according to the author, she did not intend to affect the enjoyment of the present law to affect veterans, Social Security claimants, and small businesses. And maybe I am wrong here, but we have information that the pro bono provision would prove a disaster for Social Security claimants, and the nonprofit legal service organizations and the private bar who often provide pro bono services would be, in many if not most instances, precluded from any legal recovery. So I hope that this becomes clarified in the course of our hearing today.

Now, the Equal Access to Justice Act is more than 30 years old, and it has helped seniors, veterans, Social Security claimants vindicate their rights against inaccurate or unreasonable or sometimes illegal government action. So the first thing I want to indicate that according to our reading of the bill, this proposal may prevent those who are most—the most needy in our society from securing legal representation; that is senior citizens, that is veterans, that is disabled individuals, and so many of them would never get to court if they couldn't get attorneys who would take the case pro bono but would recover legal fees if they prevail. And so what we are doing is a horrendous disservice to disabled veterans, some several thousand who recovered fees during fiscal year 2010 when they successfully appealed Veterans Administration decisions that denied them disability benefits.

So I know that the Committee is very well intentioned, but why we would be doing something like this is something I will remain to have our distinguished panel of witnesses explain to me. So I thank you very much, Mr. Chairman, and ask unanimous consent to submit the rest of my statement for the record.

Mr. COBLE. Without objection. Thank you, Mr. Conyers.

[The prepared statement of Mr. Conyers follows:]

**Statement of the Honorable John Conyers, Jr.
for the Hearing on H.R. 1996, the "Government Litigation Savings Act," before the Subcommittee on Courts, Commercial and Administrative Law**

**Tuesday, October 11, 2011, at 3:30 p.m.
2141 Rayburn House Office Building**

For 30 years, the Equal Access to Justice Act has helped senior citizens, veterans, and non-profit organizations vindicate their rights against unreasonable governmental action.

There are those, however, who question the Act's purpose and effectiveness.

Unfortunately, H.R. 1996 is yet another flawed measure masquerading as reform that this Committee is considering this Congress.

I have three principal concerns with this bill that I intend to examine during the hearing.

First, the legislation may prevent those who are the most needy in our society – namely, senior citizens, veterans, and disabled individuals – from securing legal representation.

Many attorneys take cases *pro bono* if they know their clients may be able to recover attorneys fees should they prevail.

This explains the critical role that the Equal Access to Justice Act plays with respect to the needy. It enables them to recover attorneys fees thereby making it easier for them to obtain legal representation.

For example, more than 2,500 disabled veterans used the Act during fiscal year 2010 to recover their attorneys fees in cases where they successfully appealed a Veterans Administration decision denying them disability benefits.

Without the ability to recover fees, it is doubtful that many of these veterans would have secured legal representation.

In spite of this, H.R. 1996 requires a court or administrative law judge to reduce or deny attorneys fees if the legal representation was *pro bono*.

Thus, the bill could deny access to justice for our veterans and others in need who lack the wherewithal to pay an attorney.

But H.R. 1996 could have consequences beyond simply denying veterans and others the opportunity for legal representation.

Which brings me to my second concern.

This bill unnecessarily restricts eligibility for awards under the Equal Access to Justice Act.

The Act already limits who is eligible for awards. For example, businesses with a net worth of $7 million or more are not eligible while individuals with a net worth of $2 million or more are ineligible.

But H.R. 1996 creates new ill-conceived eligibility standards and prohibits some non-profit organizations from recovering awards under the Act.

It requires the prevailing party to have a direct and monetary interest in the action. Thus, public interest groups and others will be deterred from pursuing litigation that serves the public good because those actions do not provide direct monetary relief to these groups.

For example, we would see fewer cases brought on behalf of individuals with physical disabilities as well as fewer suits to enforce federal laws that protect our health.

My third concern centers on how this bill is purely aimed at restraining environmental groups.

Especially in light of the provisions I just described, the inescapable conclusion is that this bill is a full frontal attack on environmental groups that have been awarded fees under the Act.

Most, if not all, environmental groups are non-profit organizations. Many commence lawsuits for injunctive relief to enforce laws and protect the public health.

As a result of this bill, however, many of these organizations will be deterred from bringing such actions if they cannot recover attorneys fees.

Further, this bill eliminates the possibility of increased fees, which are particularly appropriate for complex and highly specialized adjudications involving environmental law.

By eliminating the possibility of increased fees for specialization, this bill creates yet another hurdle that will make it more difficult to find competent legal representation to enforce complex environmental laws.

Contrary to the title of the bill, H.R. 1996 is a thinly disguised effort to *prohibit* litigation against the Government by the needy and public interest groups.

This bill is yet another example of a measure that panders to special interests.

Mr. COBLE. Before I recognize the Ranking Member of the Subcommittee, the distinguished gentlewoman from Tennessee, Mrs. Lummis, the author of the bill, is not allowed to participate, but without objection, we will permit her to sit on the dais. Mrs.

Lummis, good to have you with us, and without objection, I would like to introduce her statement for the record as well.

[The prepared Statement of Ms. Lummis follows:]

Statement of the Honorable Cynthia M. Lummis
Hearing on H.R. 1996, the "Government Litigation Savings Act"
House Judiciary Subcommittee on Courts, Commercial & Administrative Law

October 11, 2011

I want to thank Chairman Coble for holding this hearing today on my legislation, H.R 1996, the Government Litigation Savings Act. This hearing represents a positive step toward returning to the federal government the obligation to track the amount of tax-payer dollars used to subsidize lawsuits under the Equal Access to Justice Act (EAJA). It is also an opportunity to discuss in an open forum ideas I have put forward in the Government Litigation Savings Act (GLSA) to help EAJA work better for those it was originally intended to serve.

The legislative history for the Equal Access to Justice Act dates back 30 years and is quite extensive. It includes the reasoned opinions of several Members of the House and Senate and numerous outside groups, each with their own specific reasons for supporting or opposing the idea. One thing is clear from the sheer number of words spoken and ink spilled about the EAJA: Congress intended to help the little guy fight back against the wrongful actions of a huge, faceless federal government. For many years it appears as though it was at least marginally successful – it was significantly less expensive than what initial estimates assumed – and it did help individuals and small businesses fight for justice.

I am afraid that over time the EAJA has become a useful tool for a small slice of special interests. The original EAJA language contained cost-limiting tools that have served to make it harder for those with a legitimate grievance to recover the costs of attorney's fees, while not limiting in the least the efforts of deep-pocketed special interest groups from receiving a government subsidy for advancing a political agenda through the courts. The situation became much worse when Congress decided to end, in one form or another, the requirement that federal agencies keep track of the amount of money paid out under EAJA or other fee shifting statutes. It is this lack of transparency that has led to exaggerated claims on both sides of this issue – and it is this lack of transparency that the Government Litigation Savings Act seeks in part to correct.

The Equal Access to Justice Act is a complicated law, and it affects many people including veterans and social security claimants as well as ranchers, farmers, sportsmen, and recreationists. Unfortunately, its complex nature combined with the wild exaggerations offered by those who might have to give up their federal suing subsidy has created confusion in the press about this issue and about the Government Litigation Savings Act. Let me set the record straight: There is nothing in this bill that would prevent anyone or any group from suing the federal government. Rather, the bill equalizes treatment between all groups that might seek judicial redress by prudently limiting the net worth of those who would seek reimbursement under EAJA – a limitation that already exists for individuals and corporations.

What the GLSA would do is create a level playing field for litigants against the federal government, whether they are ranchers seeking to protect their livelihood, or sue-and-settle environmental groups seeking to advance their political ideology. It will help to reduce the incentive to sue under procedural grounds, for which the EAJA has a very low bar, by requiring

litigants to have some skin in that game. As some have rightly noted, EAJA currently has a high bar for those suing under substantive grounds. This bill does nothing to alter that fact. It is my hope that by passing the Government Litigation Savings Act, we will have discouraged repeated procedural lawsuits and encouraged substantive ones. At the very least, we will have ended a tax-payer funded subsidy that has for too long been abused by some groups.

All four of the witnesses today have had personal experience with the Equal Access to Justice Act and can help this subcommittee understand the EAJA's strengths and weaknesses. I am hopeful that as a result of this hearing today, we can bring this legislation before the full Judiciary Committee with changes to strengthen the bill and reform the EAJA's deficiencies. We should not forget that the EAJA, for all its faults, was a good idea in 1980 when it first became law and remains a good idea today. Like any good idea, there is always room for improvement, and I am hopeful that today's hearing can help us all identify meaningful improvements.

Mr. COBLE. I am now pleased to recognize Mr. Cohen, the gentleman from Memphis, for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman. I appreciate the——

Mr. CONYERS. Would the distinguished Ranking Member yield to me for just a quick query to the Chairman of the Committee?

Mr. COHEN. The distinguished Ranking Member will yield to the distinguished Ranking Member of the full Committee and the Congressman who represents the Detroit Tigers.

Mr. CONYERS. Mr. Chairman, is it possible that the author of the bill would be able to be a witness to the hearings?

Mr. COBLE. I would think no, Mr. Chairman. I would say no.

Mr. CONYERS. And why is that, could I ask?

Mr. COBLE. Pardon?

Mr. CONYERS. You don't let the authors of bills testify?

Mr. COBLE. No, sir.

Mr. CONYERS. Oh, pardon me.

Mr. COHEN. Overruled.

Mr. CONYERS. That is contrary to everything I thought I had learned about the way the process works; but if authors of the bill can't testify, but they can sit on the Committee, I guess that is second best.

Mr. COBLE. No doubt.

Mr. CONYERS. All right. Thank you.

Mr. COBLE. Mr. Cohen is recognized for 5 minutes.

Mr. COHEN. Thank you. I am recognized in my capacity as being the Ranking Member. Could I yield my time to the distinguished lady from Wyoming and let her give her statement?

Mr. COBLE. Well, I think not.

Mr. COHEN. Well, I tried. I tried.

During this Congress, instead of focusing on much-needed job creation and the opportunity for Mrs. Lummis to make her statement, the majority has pushed broad anti-regulatory messages and talked about small business.

Today we hold a hearing on H.R. 1996, the, quote, Government Savings Litigation Act, which seems to discourage those who want to challenge agency actions, including small businesses and nonprofit organizations. Specifically, the bill would amend the Equal Access to Justice Act, to prohibit small businesses and others who have successfully prevailed in court against the government from recovering legal fees. As such, this hearing and legislation seems to have the effect of being pro-government outreach and dissuading small businesses from having the opportunity to go to court and get their attorneys fees paid, just the opposite of what the majority has talked about many times and one of the many reasons why I wanted the distinguished, attractive, and bright lady from Wyoming to explain her bill.

Under the EAJA, individuals and small businesses can request reasonable attorneys fees if they are the prevailing party in a legal action against the government. The award, however, is not automatic. If the government can show its actions were substantially justified, that is the test, then the award is denied. This substantial justification defense prevents many awards and discourages frivolous or marginal cases that were filed based solely on the hope of recovering attorneys fees.

The Equal—the EAGA—JA—also caps the fee rate at below the market rate, except that a judge may award fees above the $125 cap if a specialized skill was necessary for the litigation. Still, the prevailing party must show that legal representation could not have been obtained at that capped rate but for the possibility of obtaining a higher rate. This below-market cap rate minimizes litigation and discourages frivolous or marginal cases. I haven't heard of

anybody getting $125 in a thousand years. I am sure nobody in this room even considers such a thing.

The current EAJA attorney fee provision strikes the right balance between allowing small entities the opportunity to challenge the government, little guy against big guy, while preventing expensive and runaway litigation. Still, even with the very slim chance of recovering attorneys fees, critics suggest that awards under this act are astronomical and too common. This criticism, however, is based on a mere estimate of awards and pure conjecture about the frequency of awards, as there has been no comprehensive governmental study since 1998. An updated study to reflect the current situation rather than that 13 years of age would be a good government measure.

This bill requires a report, which is laudable. Unfortunately, that is the only reasonable provision of this bill. H.R. 1996 should concern all of us. It will negatively impact veterans, seniors, our public health and small businesses.

A 1998 GAO report found that in 1994, 98 percent of fee applications submitted and 87 percent of the dollars awarded under this act were in Social Security disability cases and veterans disability cases, two of our favorite constituencies. Based on those numbers, this bill would prevent the awarding of fees disproportionately in cases brought by nonprofit veterans groups challenging the VA for systematic delays. This discourages the filing of these cases and leaves it to individual veterans to bring the cases. Most of these veterans cannot afford to do so.

Likewise, the bill also discourages legal aid programs from bringing cases on behalf of senior citizens. Further, because H.R. 1996 bars recovery of fees from most nonprofits in citizen suits, it will discourage environmental groups from bringing actions to enforce environmental laws that protect our public health and lands.

In light of the impact on our veterans, seniors, and public health and lands, and many other concerns, various groups have expressed opposition. They include the National Organization of Veteran's Advocates, the National Organization of Social Security Claimant's Representatives, the Natural Resources Defense Council—which, of course, includes Robert Redford, who I am sure the sponsor of this bill likes, for all women like him—the National Legal Aid and Defender Association, the Center for Auto Safety, and the Center for Food Safety. There are dozens more.

I thank our witnesses for their participation in today's hearing. I look forward to their testimony, and I look forward to the Memphis-East Carolina football game this Saturday and hope you won't beat up on us too badly, and——

Mr. COBLE. Based upon last week's outing against Houston, I don't think you have very much to worry about.

Mr. COHEN. We are worse, believe me.

Mr. COBLE. We will find out.

Mr. COHEN. Can I submit these for the record?

Mr. COBLE. Without objection, it will be received.

[The information referred to follows:]

The more than 100 groups listed below <u>strongly oppose</u> the Government Litigation Savings Act (H.R. 1996):

Advocates for Highway and Auto Safety

Alaska Wilderness League

Alliance for Justice

American Association for Justice

American Civil Liberties Union

Asian American Legal Defense and Education Fund

Big Blackfoot Riverkeeper

The Brennan Center for Justice at NYU School of Law

Butte Environmental Council of CA

California Sportfishing Protection Alliance

Californians Aware

Center for Auto Safety

Center for Biological Diversity

Center for Environmental Health

Center for Food Safety

Center for Justice & Democracy at New York Law School

Center for Plant Conservation

Champaign County Health Care Consumers

Chicago Consumer Coalition

Citizens for a Better Jefferson County

Citizens for Sanity.Com, Inc.,

CLASP

Clean Water Action

Coal River Mountain Watch

Concerned Friends of Ferry County

Conservancy of Southwest Florida

Conservation Congress

Conservation Law Foundation

Conservation Northwest

Consumer Action

Consumer Federation of America

Consumer Federation of California

Consumers for Auto Reliability and Safety

Consumers Union

Consumer Watchdog

Cook Inletkeeper

CORALations

Corporate Ethics International

Cottonwood Environmental Law Center

Council for Responsible Genetics

Crab Boat Owners Association

Defenders of Wildlife

Demos

Dogwood Alliance

Earth Day Network

Earthjustice

Ecological Rights Foundation

Empire State Consumer Project

Endangered Species Coalition

Environmental Defense Fund

Environmental Law Foundation

Food & Water Watch

Forest Ethics

Freedom Socialist Party

Friends of the Earth

Friends of Whitehaven Park

Grand Canyon Trust

Great Old Broads for Wilderness

Greenpeace

Gwich'in Steering Committee

Hackensack Riverkeeper

Heartwood

Hells Canyon Preservation Council

Humboldt Baykeeper

International Center for Technology Assessment

International Marine Mammal Project of Earth Island Institute

KAHEA: The Hawaiian-Environmental Alliance

Kentucky Heartwood

Kettle Range Conservation Group

Life of the Land

Louisiana Environmental Action Network

Lower Mississippi Riverkeeper

NAACP Legal Defense and Education Fund, Inc.

National Community Reinvestment Coalition

National Employment Lawyers Association

Native Forest Council

National Legal Aid & Defender Association

National Organization of Social Security Claimant's Representatives

National Organization of Veterans' Advocates, Inc.

Natural Resources Defense Council

National Veterans Legal Services Program

New Mexico Sportsmen

Northern Alaska Environmental Center

Northern California Council, Federation of Fly Fishers

North Carolina Waste Awareness and Reduction Network

North Cascades Conservation Council

Oceana

Ogeechee Riverkeeper

Orange County Coastkeeper

Oregon Natural Desert Association

Oregon Wild

Organic Consumers Association

Our Children's Trust

Pacific Coast Federation of Fishermen's Associations

Pacific Environment

Pacific Institute

People for the American Way

Port Townsend AirWatchers

Privacy Rights Clearinghouse

PTAirWatchers

Public Citizen

Public Employees for Environmental Responsibility

Rainforest Relief

Rocky Mountain Wild

Russian Riverkeeper

SalmonAid Foundation

San Diego Coastkeeper®

San Francisco Baykeeper

Save Our Wild Salmon Coalition

Save the Manatee Club

Sciencecorps

Small Boat Commercial Salmon Fishermen's Association

Southern Utah Wilderness Alliance

Spokane Riverkeeper

St. Johns Riverkeeper

Sugar Law Center for Economic and Social Justice

Surfrider Foundation

The Leadership Conference on Civil and Human Rights

Turtle Island Restoration Network

Truck Safety Coalition

Utah Environmental Congress

Valley Watch, Inc.

Waterkeeper Alliance

WaysSouth

Western Environmental Law Center

Western Watersheds Project

White Mountain Conservation League

WildEarth Guardians

Wild South

Wyoming Outdoor Council

Xerces Society for Invertebrate Conservation

Yadkin Riverkeeper

Yahi Group of the Sierra Club

Mr. COHEN. Thank you, sir.

Mr. COBLE. And I say to the gentleman from Michigan, congratulations to the Tigers. Are they up now? Are they leading?

Mr. CONYERS. Not at all.

Mr. COHEN. But they are going home. My team is over.

Mr. COBLE. Your team is over? Texas? Oh, boy.

It is good to see all of you. I have detailed introductions to give, but I think we need to know the background of our distinguished witnesses, so please bear with me. Good to have each of you with us.

Mr. Jeffrey Axelrad teaches at George Washington University School of Law. Mr. Axelrad served at the Justice Department for more than 35 years and was actively involved in policy and development as well as litigation. He worked as director of the Department of Justice's tort branch from 1977 to 2003. He also served as a trial attorney for 8 years, earning the civil division's highest honor, the Stanley D. Rose Memorial Award. He also received the Army's highest civilian award, the Commander's Award for Public Service, a Presidential Meritorious Executive Award, and the Office of Management and Budget General Counsel's Award. Mr. Axelrad, thank you for sharing your insights and experiences with the Subcommittee today.

Mr. Lowell Baier is the immediate past president of The Boone and Crockett Club, the Nation's oldest conservation organization. The Boone and Crockett Club was founded by Teddy Roosevelt in 1887 to promote wildlife conservation and was instrumental in establishing Federal lands, conservation laws and agencies, and several other national conservation groups. A lawyer by training, Mr. Baier is currently leading the Club in the extensive study of the role of litigation in conservation. He also is the founding director of the National Conservation Leadership Institute and Executive Education Program for Conservation Professionals. For these and other accomplishments during his career as a small business owner, Mr. Baier was named conservationist of the year by Field and Stream magazine. Mr. Baier, we are glad to have you with us as well today.

Ms. Jennifer Ellis is a cattle rancher and wheat and hay farmer from Blackfoot, Idaho. She chairs the Western Legacy Alliance, a volunteer organization focused on preserving working land and lifestyles in the American West. Recently Ms. Ellis was president of the Idaho Cattle Association and chairman of Idaho Sage Grouse Advisory Committee. She also chaired Idaho's Wolf Depredation Committee, and she is director on the board of the Idaho Agricultural Credit Association, and the former chairman of the Blackfoot Hope House Project. Through these experiences, Ms. Ellis has acquired much firsthand knowledge of environmental litigation, more than she ever wanted to know I would dare wager. Ms. Ellis, thank you for coming all the way from Idaho to be with us today. We appreciate that.

Finally, Mr. Brian Wolfman is a visiting professor of law at the Georgetown University School of Law where he served as the co-director for the school's Institute for Public Representation. Prior to joining the Georgetown faculty, Mr. Wolfman spent nearly 20 years at the national public interest law firm, Public Citizen Litigation Group, where he served the last 5 years as director. Prior to that, he also conducted trial and appellate litigation as a staff lawyer at a rural poverty law program in Arkansas. He has handled a broad range of litigation and argued five cases before the Supreme Court. He has taught appellate litigation courses at his alma mater, Harvard School of Law, and also served as an adjunct pro-

fessor at Stanford, Vanderbilt, and American University. Mr. Wolfman, thank you as well for being with us.

Gentlemen and lady, good to have you all with us. We try to go by the 5 minute rule, so if you will keep your eye peeled on the little panel before you, when the light is green, that indicates that you are alive and well, but that light will turn amber, and that is your notice that a 1-minute delay is about to be resolved. We will not keelhaul any of you for violating the 5-minute rule, but if you can comply with it, we would appreciate that. Is that panel working out there? Can you all see the panel? Can you see the green light now?

Mr. COBLE. Mr. Axelrad, we would be glad to have you start your testimony.

TESTIMONY OF JEFFREY AXELRAD, PROFESSORIAL LECTURER IN LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. AXELRAD. Thank you. I will summarize my statement and would appreciate the entire statement being placed in the record.

Mr. COBLE. Without objection.

Mr. AXELRAD. I am here to share my views on H.R. 1996, the Government Litigation Savings Act. This bill proposes sensible amendments to provisions of the Equal Access to Justice Act, commonly known as EAJA. My testimony will discuss specific improvements this bill makes to EAJA.

Payment of costs and attorneys fees is a transfer of money, pure and simple. Our Constitution's appropriations clause bars payments from the public Treasury absent a congressional appropriation. This clause stands as a bulwark, ensuring that the Congress decides whether and under what conditions Treasury funds should be utilized.

EAJA includes four types of key provisions. First, the United States is made susceptible to an award of attorney fees under certain circumstances when a private party would otherwise be responsible for paying an attorney fee after receiving an award in a judicial proceeding. This regime applies to settlements as well.

Second, EAJA authorizes attorney fee awards and expenses if the nongovernment party prevails and the government's underlying conduct was not substantially justified absent special circumstances. This is a one-way, loser-pay provision that creates different law against the American taxpayer. EAJA puts the Federal Government in a unique and largely disfavored position. H.R. 1996 includes needed amendments to more precisely specify the means of determining an award.

Third, EAJA includes standards for recovering attorney fees, including when the underlying conduct was not substantially justified and when the nongovernment party is considered the prevailing party. Vague terms like these can lead to protracted side litigation and manipulation. H.R. 1996 seeks to avoid abuse and to clarify the provisions.

Fourth, EAJA also penalizes the government if it is not sufficiently successful in seeking judicial review of an agency adjudication where civil action commenced by the United States. There is no such provision against such demands for the private party

which can disadvantage government civil actions and enforcement proceedings.

H.R. 1996 makes several needed amendments to EAJA's substantive attorney-fee award provisions and adds requirements to collect and assemble precise data permitting insight into EAJA's results in practical terms. H.R. 1996 raises the maximum rate of payment for attorneys from $125 per hour to $175 per hour and substitutes a precise means of determining cost-of-living increases. In return for raising the fee, these amendments eliminate the exception to the fee limit for an attorney who asserts that a special factor, such as the limited availability of qualified attorneys or agents for the proceedings, justifies a higher fee.

In *Pierce v. Underwood*, the Supreme Court attempted to limit the ability to evade application of the cap, but its decision did not end litigation over whether the fee cap can be pierced. Far from it. The Federal Appellate Courts' decisions are in disarray.

H.R. 1996 places a limit or cap with a limited exception on the aggregate amount the Public Fisc will pay to an individual or entity for attorney fees or other expenses and confines EAJA to parties who have a direct and personal monetary interest in the proceedings. These amendments seek to confine EAJA to its legitimate and original purpose.

H.R. 1996 sharpens the language of extant fee-reduction provisions by requiring reductions if the party seeking award has engaged in specified abusive misconduct. The ability of Congress to perform its oversight of EAJA depends on the availability of information concerning agency payments predicated on the act. Currently this information is largely unavailable. Agencies have no obligation to collect and assemble data, and even if some agencies did collect data, there is no central authority to organize and report the data in a sensible format both to the Congress and the public.

H.R. 1996 remedies this lack of information. Specifically, H.R. 1996 requires the Chairman of the Administrative Conference of the United States to issue an annual report to the Congress and to make the report publicly available online. H.R. 1996 also requires GAO to conduct a one-time audit of EAJA's implementation during recent years, starting with 1995.

H.R. 1996 leaves intact the basic structure and central focus of EAJA. H.R. 1996 serves to correct unintended consequences and clarifies vague terminology that has resulted in substantial wasteful collateral litigation. H.R. 1996 also requires that Congress receive information or that it may determine how effectively EAJA works in practice and the costs associated with EAJA. This will permit the Congress to provide more effective oversight and enhance the ability of citizens to hold their government accountable for the actions of government agencies. In my opinion, H.R. 1996 represents a move toward enhancing the ability of EAJA to best serve its intended purposes.

I will be happy to answer any questions.

[The prepared statement of Mr. Axelrad follows:]

STATEMENT OF JEFFREY AXELRAD*
BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING H.R. 1996
October 11, 2011

Thank you for providing this opportunity to share my views on H.R. 1996, the "Government Litigation Savings Act." This bill proposes sensible amendments to provisions of the Equal Access to Justice Act (EAJA). My testimony will discuss specific improvements this carefully crafted bill makes to EAJA after providing an overview of basic principles applicable to awards of costs and, especially, attorney fees against the federal government and EAJA's effects on those principles.

Overview of Basic Principles

Payment of costs and attorney fees is a transfer of money, pure and simple. Our Constitution's Appropriations Clause bars payments from the public Treasury absent a Congressional appropriation. This Clause, Constitution, Article I, Section 9, Clause 7, stands as a bulwark ensuring that the Congress decides whether, and under what conditions, Treasury funds should be utilized. In the context of attorney fee payments, the federal judiciary applies the doctrine of sovereign immunity to preserve Congress's power over the public fisc. In particular, the judiciary has recognized that without a waiver of sovereign immunity, courts may not award attorney fees to be paid by the United States or its agencies. *See., e.g.,*

* I am a Professorial Lecturer in Law at George Washington University Law School. From 1967 -2003, I served as an attorney at the Department of Justice, including from 1977-2003 as Chief/Director of the Torts Section/Branch. My remarks represent my personal opinions and do not represent the views of The George Washington University or any other organization.

Ardestani v. Immigration & Naturalization Service, 502 U.S. 129, 137 (1991) ("The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity.")

Over the years, Congress has enacted statutes authorizing awards of attorney fees in particular proceedings against the United States under varying conditions. These conditions have been set forth in subject-matter specific statutes. In these limited circumstances, Congress has determined that public policy considerations outweigh the need to avoid a drain on the public fisc to pay attorney fees. *See, e.g.,* 5 U.S. C. § 552(a)(4)(E) (Freedom of Information Act). In contrast, EAJA's statutory scheme is applicable generally to federal agencies and programs, rather than being limited to a particular subject-matter or agency. EAJA does not interfere with these more particular statutory provisions. Likewise, H.R. 1996 also does not affect those provisions.

The purpose of EAJA was and remains "to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani, supra*, 502 U.S. at 138. EAJA applies to award attorney fees where the United States is a party to a judicial proceeding, *see* 28 U.S.C. § 2412, and to prevailing parties in most agency adversary adjudications, *see* 5 U.S.C. § 504(a). EAJA accomplishes its goal of awarding attorneys fees to prevailing parties in judicial proceedings and administrative actions in four key respects:

(1) There is a general waiver of sovereign immunity rendering the United States susceptible to an award of attorney fees under certain circumstances when a private party would otherwise be responsible for paying his or her own attorney fee

after receiving an award in a judicial proceeding. *See* 28 U.S.C. § 2412(b). Absent any award based on a finding that the government "acted in bad faith," these court ordered awards are usually to be paid from the Judgment Fund established under 31 U.S.C. § 1304—a permanent indefinite appropriation. *See* 28 U.S.C. § 2412(c)(2) (referencing 28 U.S.C. § 2414, 2517); *see also* General Accountability Office (GAO), Principles of Federal Appropriations Law ("The Red Book), Vol. III, Chapter 14 (providing explanation of payment procedure). This regime applies to settlements as well.

(2) There is a second, separate waiver of sovereign immunity authorizing attorney fee awards and expenses any time the non-government party prevails, and the government's underlying conduct was not substantially justified, absent special circumstances. *See* 28 U.S.C. § 2412(d); 5 U.S.C. § 504(a). This is a one-way loser pays provision that creates different law against the American taxpayer. Ordinarily, in American litigation, whether in court or an administrative proceeding, each party bears the cost of defraying its own attorney fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). By offering to pay attorneys fees to those who sue the federal government or are sued by the federal government, EAJA puts the federal government in a unique and largely disfavored position. While EAJA includes some limitations and conditions on recoveries, these limitations and conditions have not been successful in cabining in awards and have led to substantial, unproductive tangential litigation. H.R. 1996 includes needed amendments to more precisely specify the means of determining an award.

(3) EAJA includes standards for recovering attorneys fees, including, as referred to above, when the underlying conduct was not "substantially justified" and when the non-government party is considered the "prevailing party." 28 U.S.C. 2412(d)(1)(A); 5 U.S.C. § 504(a)(1). Vague terms, like these, can lead to protracted side litigation and manipulation. For example, the private party may only settle a dispute if the settlement includes language that it should be considered the prevailing party in the dispute and that the government's position was not substantially justified – regardless of the actual facts. This could lead to abusive and unintended awards; particularly when the party seeking the award has no direct financial stake in the proceeding, but is suing over a policy difference. H.R. 1996 seeks to avoid this kind of abuse and to clarify the provision.

(4) EAJA also penalizes the government if it is not sufficiently successful in seeking judicial review of an agency adjudication or a civil action commenced by the United States. *See* 28 U.S.C. § 2412(d)(1)(D). This provision states that if the government's position in the appeal is unreasonably "substantially in excess of the judgment finally obtained by the United States," the other party gets its fees and other expenses. *Id.* There is no such provision against such demands for the private party, which can disadvantage government civil actions and enforcement proceedings.

H.R. 1996 is a sensible, balanced amendment to the Equal Access to Justice Act

I will now summarize the changes and clarifications H.R. 1996 makes to EAJA's substantive attorney fee award provisions and the addition of requirements to collect and assemble precise data permitting insight into EAJA's results in practical terms.

Amendments both to the administrative proceedings and litigation attorney fee award provisions of EAJA:

H.R. 1996 raises the rate of payment for attorneys from $125 per hour to $ 175 per hour and substitutes a precise means of determining cost of living increases to the rate of payment for general "increase in the cost of living" terminology. H.R. 1996, §§ 2(a)(1)(B), 2((a)(2)(cost of living provision); 2(b). In return for raising the fee, these amendments eliminate the exception to the fee limit for an attorney who asserts that "a special factor, such as the limited availability of qualified attorneys or agents for the proceedings" justifies a higher fee. 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A). The issue of what this terminology means was the subject to the Supreme Court's first decision construing EAJA, *Pierce v. Underwood*, 487 U.S. 552 (1988). *Pierce* observes that if the exception is construed broadly to encompass any proceeding where skilled and experienced enough were in short supply, the exception would "effectively eliminate" the cap. For this reason, the Court held that the term must refer to qualified attorneys in a "specialized" sense, providing as examples practice specialties "such as patent law, or knowledge of foreign law or language." Unfortunately, this ruling did not end litigation over whether the fee cap can be pierced. Far from it. The Federal appellate court decisions are in disarray.

The Ninth Circuit has gone so far as to hold that a practice in social security law is specialized enough to pierce the cap. *See Pirus v. Bowen*, 869 F.2d 536 (9th Cir. 1989). Compare *Pirus* and its progeny with cases such as *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992), which look at piercing the cap with a jaundiced eye, and *Raines v. Shalala,* 44 F.3d 1355 (7th Cir. 1995) which rejects the theory that social security law is a specialty warranting piercing the cap but seems to suggest that distinctive legal knowledge may sometimes warrant piercing the cap. Similarly, there should be no need to litigate how to determine cost of living increases in the limit on a case-by-case basis. There is too much litigation over these issues to discuss here. Plainly, this litigation is wasteful. The Supreme Court has wisely admonished that a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). With the benefit of experience, H.R. 1996 both raises the cap and eliminates lawyers' ability to foment litigation seeking to eviscerate the cap's application. These amendments mark a signal improvement over the vagaries inherent in the current law.

Both the administrative proceedings and litigation provisions of H.R. 1996 place an additional limit or cap on the aggregate amount the public fisc will pay to an individual or entity for attorney fees or other expenses. The amendments limit payments for a single proceeding to the amount of $200,000 and prohibit payment to the same individual or entity for more than three proceedings initiated in a single year. This approach keeps awards from taking funds from substantive programs to an undue or excessive extent, and is set high enough not to detract from EAJA's core purposes. Importantly, it serves to dissuade professional litigants, where the additional incentive of hope for an extremely substantial attorney fee award to bring a claim is not appropriate.

H.R. 1996 additionally eliminates exceptions to net worth and employee limits on attorney fee awards. This change in eligibility for an award places all entities on an equal footing rather than favoring some entities over all others. H.R. 1996 would also limit award eligibility to a party "who has a direct and personal monetary interest" in the proceeding, "including because of personal injury, property damage or unpaid agency disbursement." As with the limits on fees paid in a proceeding, these proposals seek to confine EAJA to its legitimate and original purpose: "to diminish the deterrent effect of seeking review of, or defending against, government action," Pub. L. 96-481, Title II, § 202(c)(1), 94 Stat. 2325 (1980), by honing in awards to parties with concrete injuries justifying an award.

H.R. 1996 sharpens the language of extant fee reduction provisions authorizing, but not requiring, reductions if the party seeking an award "unduly and unreasonably protracted the final resolution" of a proceeding. 28 U.S.C. § 2412(d)(1)(C); 5 U.S.C. § 504 (a)(3). H.R. 1996 substitutes terminology that requires reduction and does so not only for unreasonable protraction of a matter but also if the party "acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith." Under these circumstances, it would surely be unreasonable and against the taxpayers' interests to fully fund attorney fees for such action.

Transparency mandates:

The ability of Congress to perform oversight of EAJA depends on availability of information concerning agency payments predicated on the Act. Currently, this information is largely unavailable. The Government Accountability Office has recently attempted to collect data pertaining to one limited subset of EAJA payments, those arising from environmental proceedings. *See* GAO Report 11-650, *ENVIRONMENTAL LITIGATION: Cases against EPA and*

Associated Costs over Time (GAO, August 2011). This report reflects an inability to collect all data even when only three agencies are involved in the attempt to collect data. EAJA applies government-wide. The lack of data is striking. The costs EAJA imposes on the public fisc are opaque. As the Report reflects, "[c]urrently, no aggregated data on such environmental litigation or associated costs are reported by federal agencies. They key agencies involved – Justice, EPA and the Treasury – maintain certain data on individual cases in several internal agency databases, but collectively, these data do not capture all costs." *Id.* at 2.

Agencies have no obligation to collect and assemble data, and, even if some agencies did collect data, there is no central authority to organize and report the data in a sensible format both to the Congress and the public. H.R. 1996 remedies this lack of information. Specifically, H.R. 1996 requires the Chairman of the Administrative Conference of the United States to issue annual report to the Congress, and to make the report publicly available online, including relevant data, and requires the Attorney General to assist in assembly of the data. H.R. 1996 also requires GAO to conduct a one-time audit of EAJA's implementation during recent years, starting with 1995.

As the GAO report further underscores, some EAJA payments come from the permanent, indefinite appropriation established under 31 U.S.C. § 1304, commonly known as the Judgment Fund. The agency involved in such a proceeding has no monetary incentive to hold down the amount of an award to a reasonable level. These payments can be made as part of settlement, not just as the result of a contested decision.

When I was at the Department of Justice, it became a regular part of my workload to guard against unjustified raids on this Judgment Fund. I found it necessary to guard constantly

against unauthorized or excessive payments. What I wrote several years ago is on point today: "[A]gencies do not have a direct fiscal incentive to guard against excessive payments from the Judgment Fund, in that payments from the Judgment Fund do not reduce agency appropriations available for their programs . . . Special interests pursued by claimants are noisy and visible . . . The incentive to yield to the perceived special need du jour is all too evident." Westlaw, 1 Ann. 2004 ATLA-CLE 435 (2004).

H.R. 1996 requires that that the data included in the Chairman of the Administrative Conference's reports include data from settlements subject to nondisclosure provisions in settlement agreements, but does not affect any other information subject to the nondisclosure provisions. My experience is that, in monetary settlements, nondisclosure provisions are most commonly sought when a very substantial sum is to be paid. I consider inclusion of nondisclosure provisions in settlements ordinarily to be unjustified in settlements to which the government is a party but nondisclosure provisions are a fact of life. In order to assemble useful data, the limited disclosure H.R. 1996 mandates is essential.

*****

Conclusion

H.R. 1996 leaves intact the basic structure and central focus of EAJA. EAJA will remain available to recover attorney's fees when government has acted oppressively and unreasonably. H.R. 1996 serves to correct unintended consequences and clarifies vague terminology that has resulted in substantial, wasteful collateral litigation. H.R. 1996 also requires that the Congress receive information in order that it may determine how effectively EAJA works in practice and the costs associated with EAJA. This will permit the Congress to

provide more effective oversight and enhance the ability of citizens to hold their government accountable for the actions of government agencies. In my opinion, H.R. 1996 represents a move toward enhancing the ability of EAJA to best serve its intended purposes.

I will be happy to answer any questions.

Mr. COBLE. Thank you, Mr. Axelrad.
Mr. Baier, you are recognized for 5 minutes.

TESTIMONY OF LOWELL E. BAIER, PRESIDENT EMERITUS, THE BOONE AND CROCKETT CLUB

Mr. BAIER. Thank you, Mr. Chairman, Representative Cohen, Representative Conyers, Members of the Committee. I represent The Boone and Crockett Club, America's oldest conservation organization, founded in 1887 by Theodore Roosevelt, and I follow him as the Club's 28th president and am now president emeritus.

We support this bill because it will improve managing the conservation of our Nation's fish, wildlife, and natural resources. We also support the Equal Access to Justice Act's historic primary purpose for retirees, for veterans, for small business, and for all citizens. They must be protected from mistakes and overzealous Federal agencies. These are the citizens who can least afford to protect themselves, and we are resolute that we do not tread on the historic purpose of EAJA.

Under this bill, individuals will remain eligible to use EAJA if their net worth does not exceed $2 million, just as they do today. Likewise, small business will remain eligible provided their net worth does not exceed $7 million. The bill extends these same eligibility requirements to large interest groups. Today these groups can recoup legal fees under EAJA regardless of their net worth.

Unlimited eligibility has helped make litigation commonplace in the conservation arena. This is so roundly understood that even Earl Devaney, the Inspector General of the Department of Interior in 2008, said, "As it now stands, lawsuits are driving nearly everything the Fish and Wildlife Service does in the endangered species arena."

Just last month a new settlement agreement imposed the views of two aggressive interest groups on the entire endangered species listing program through 2017. This settlement resulted from litigation on procedural—procedural rather than substantive grounds. This is the type of litigation for which EAJA provides a perverse incentive. We want to put "equal" back into the Equal Access to Justice Act by requiring everyone to meet the same eligibility standards.

To be clear, litigation will continue, but the taxpayer will no longer pay the legal bills of large interest groups. Capping eligibility on 501(c)(3)s will also make EAJA consistent with the other 205 fee-shifting statutes, not one of which exempts 501(c)(3)s from the eligibility requirements that apply to private citizens and small business.

Senior counsel, Henry Cohen, from the Congressional Research Service, in 2009 determined that EAJA was an anomaly in this regard. It is a glaring privilege that is the antithesis of equality and fairness. The antithesis of equality and fairness. Along with fairness, this bill will restore accountability and transparency to EAJA going forward.

When EAJA was enacted in 1980, it required an annual report of the number of cases processed and total attorneys fees reimbursed. That reporting ended in 1995. Since then, the Congress and the country have been in the dark of the costs of EAJA, which is why this bill reinstates the reporting requirement beginning with an audit of prior unreported years.

Our own targeted research based on GAO reports, tax returns, court records, and data from agencies, shows costs of EAJA of at least $50 million per year from litigation by the top 20 environmental litigants. What are the total costs? We don't know. That is why reinstating the annual reporting and audit costs since 1995 are critical.

In conclusion, the actual payout of legal fees is just the tip of the iceberg. We estimate that it represents one-fifth of the total costs. The hidden costs are the personnel time spent by agencies reviewing procedures, defending procedures, and often redoing the entire process. Then there are the costs of the Justice Department attorneys defending the cases.

Mr. Chairman, Members of the Committee, this bill is about the historic purpose of EAJA. America's conservation community urges you to put "equal" back into the Equal Access to Justice Act in the interest of fairness, sound management of our natural resources, and fiscal responsibility. Thank you for your consideration.

Mr. COBLE. Thank you, Mr. Baier.

[The prepared statement of Mr. Baier follows:]

TESTIMONY OF LOWELL E. BAIER, PRESIDENT EMERITUS, BOONE & CROCKETT CLUB ON H.R. 1996, "THE GOVERNMENT LITIGATION SAVINGS ACT". BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE HOUSE JUDICIARY COMMITTEE

Chairman Coble, Vice Chairman Gowdy, Representative Cohen, members of the committee, thank you for your invitation to testify this afternoon on H.R. 1996. My name is Lowell E. Baier, and I'm here today on behalf of the Boone and Crockett Club, America's oldest conservation organization founded in 1887, 124 years ago, by Theodore Roosevelt, and I followed him as the Club's 28th President, and now serve as President Emeritus, the first in our 124 year history.

The proposed improvements to the Equal Access to Justice Act ("EAJA") in the Government Litigations Savings Act ("GLSA"), H.R. 1996, are true to the historical purposes of EAJA and carefully designed to improve it. EAJA was meant to help resolve unjustified or illegal demands by federal agencies by reimbursing affected citizens for the cost of hiring lawyers. Congress realized that the same transactional costs that had justified establishing fee-shifting statutes for specific causes, such as civil rights legislation, applied more generally if the party was too small or impecunious to afford to resist government demands. EAJA as drafted in 1979 and 1980 thus had two parties clearly in mind: the individual and the small business. This was borne out in numerous hearings, as well as in EAJA's net-worth eligibility requirement, which prevents large companies or wealthy individuals from utilizing EAJA. EAJA was not meant to be a general entitlement to reimbursement of litigation costs against the federal government, but rather a mechanism to check errors and over-zealous enforcement by government agencies against the most vulnerable.

The record shows that four days before the legislation was finalized, a provision was inserted exempting 501(c)(3) non-profit organizations from having to meet the net worth eligibility requirements that had been placed on all other EAJA users. EAJA's non-profit exception was unprecedented in American law, and remains an anomaly in fee-shifting legislation. According to Henry Cohen's study for the Congressional Research Service, as of 2009 the United States Code contained 205 statutory exceptions to the American Rule – individual provisions for the shifting of attorneys' fees from one party to another.[1] Out of all of these statutes, only EAJA contains a provision that prescribes special treatment for 501(c)(3) and other tax-exempt organizations. GLSA would eliminate this extraordinary provision in the interest of fairness. EAJA should be available to non-profit organizations on the same terms it is available to corporations, local governments, and all other organizations, viz. that the organization not have a net worth exceeding $7 million.

We are concerned – and our research supports this concern – that the unlimited availability of EAJA fees to interest groups has particularly degraded the effectiveness of land management, wildlife, and environmental agencies. We support a reasoned, moderate response to this concern. GLSA only removes a needless incentive for interest group litigation without removing any existing causes of action. This is especially pertinent in APA cases because the APA's stringent requirements are often subject to litigation. An APA suit can be brought simply to make the agency acknowledge missing a deadline, or force it to re-do its rulemaking (without changing the substance of the rule), or issue a longer, more comprehensive explanation in an environmental impact statement, or a biological opinion, etc. This is especially the case when an

[1] Henry Cohen, Cong. Research Ser., 94-970, Award of Attorneys' Fees by Federal Courts and Federal Agencies 1-2 (2009).

agency is tasked with inflexible statutory deadlines, or has complex and open-ended analytical duties, as land management, wildlife, and environmental agencies usually do. Although these procedural rulings often can play an important role in keeping agencies accountable, in many cases agencies are made to reissue their determinations – at considerable expense – while the substance of their decisions is upheld. When a group repeatedly brings essentially similar procedural suits without having grounds to challenge the merit of the agency's decisions, this litigation becomes a distraction from the agency's mission.

Generally, groups contemplating using the APA in this manner have to factor in the considerable costs of hiring counsel. The litigation cost of bringing an APA suit is a large part of what has historically prevented the courts from being flooded with administrative litigation. The 501(c)(3) exemption in EAJA disrupts this balance, since an interest group that wants to simply obstruct the agency now has its efforts repeatedly subsidized. For this reason, among other changes we support both the removal of the 501(c)(3) exemption as well as the proposed limit of 3 EAJA claims per year. Additionally, we suggest a further improvement to the bill in this regard. In calculating the net worth of the litigant the net worth of all parent entities and wholly owned subsidiaries should be included, in order to prevent the use of small ephemeral or shell organizations to circumvent the net worth eligibility requirement.

None of the above is to suggest that various groups' legal engagement with agencies is to be radically curtailed or prevented. The issue is rather whether these groups, unlike private individuals or small businesses, need government funding to do so. The late Judge George MacKinnon of the D.C. Circuit noted in objection to the idea that interest groups needed government subsidy, that in "practically every case I have seen where agency action is attacked by public interest protestants or litigants, they are usually very well funded by voluntary

organizations that enjoy tax-free status."[2] Though we sympathize considerably with Judge MacKinnon's view, and the witnesses at various EAJA hearings who espoused similar views, GLSA's goal (which we support) is much more modest. Instead of giving 501(c)(3) groups a most-favored-party status equivalent to a double-subsidy, the GLSA seeks only to treat those groups as if they were themselves small business and to apply the means test it applies to everyone else to them. If they have the means to litigate on their own, they should, just as every other private citizen or business is expected to. Moreover, it should be recalled that nothing that the GLSA does will affect non-profit groups' access to any other fee-shifting statutes. And it will not explicitly block non-profit groups from using EAJA; it merely applies the same net worth standards that apply to every other applicant for funds under the law.

While it places non-profit organizations on the same footing as other litigants, GLSA protects the small business and individuals that EAJA was intended for. We recognize that the current cap on hourly rates of $125 an hour is impractically small in today's legal market, and we support GLSA's increase of that figure to $175. Furthermore, we are pleased that for the first time GLSA pegs the hourly cap to inflation. This will improve public perception of EAJA and create more uniform fee calculations across different jurisdictions.

GLSA also proposes to restore the reporting requirements that were removed from EAJA by the Federal Reports Elimination and Sunset Act of 1995. An examination of the EAJA reports generated through 1994 illustrate why Congress may have thought it appropriate to end reporting. Discounting an unusual but well-explained number of Social Security applications in 1994, total EAJA expenditures, including awards under both 5 U.S.C. § 504 and 28 U.S.C. §

[2] Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary, 95th Cong. (1977)

2412, had been under $4 million in every year.[3] Presumably confident that the trend would continue, Congress eliminated the reporting. Without reporting, it is impossible to know precisely how much EAJA is costing the nation's taxpayers, but there are many signs that it is much more than $4 million a year. Only through restoring reporting can we restore transparency and accountability to EAJA.

We support the reporting provisions in GLSA, which take three forms. First, GLSA requires the Administrative Conference of the United States to resume issuing annual reports. These reports should be made public through a searchable online database, accessible without cost, so that the American people know how their money is being spent. Second, the reports and database should include not just financial information but also information about the nature and outcome of each case: the parties involved, the agency or court involved, the presiding officer or judge, the amount of fees, the hourly rates the fees represent, and the basis on which the government's position was found to be not substantially justified. Such information will promote accountability throughout the application of EAJA, and so ought to be publically available and easily accessed. When an EAJA award is pursuant to an undisclosed settlement, it would be proper to advance the goal of accountability by disclosing the EAJA award even though the rest of the settlement remains confidential. Finally, GLSA requires the Government Accountability Office to conduct and publish an audit of EAJA expenses during the period from 1995 to the present, when there has been no reporting.

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[3] Figures calculated from the following: Administrative Conference of the U.S., Report of the Chairman of Administrative Conference on Agency Activities Under the Equal Access to Justice Act (1982) *et seq.*; Administrative Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the U.S. Courts, Report by the Director on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980 (1982) *et seq.*, *located in* 1982 Judicial Conference Report *et seq.*; Department of Justice, Equal Access to Justice Act: 1993 Annual Report.

Although the exact costs of EAJA in the last decade and a half are unknown, we have undertaken to learn as much about them as possible. Our findings are disturbing, to say the least. By focusing on a small group of twenty environmental organizations we were able to conduct two investigations into contemporary EAJA awards. In the first, we examined cases marked as "closed" by the United States Courts' Public Access to Court Electronic Systems (PACER) in a one-year span from September 1, 2009 to August 31, 2010. Because PACER only tracks court cases, our study covered EAJA payments under 28 U.S.C. § 2412 but not EAJA payments in administrative proceedings under 5 § U.S.C. 504. We found that EAJA payments to these twenty groups alone had at least equaled $5.8 million in that period, with most of those awards directed against the Department of Interior, specifically the Fish and Wildlife Service and the Bureau of Reclamation. To put this in context, accounting for inflation, this sum is roughly equal to the entire cost of EAJA in 1993.

In the second study, we examined tax returns filed by the same twenty organizations. In the years 2003-2009, we found that the organizations combined to claim an average of $9.1 million dollars per year in attorneys' fees. This figure exceeds the PACER figure because it includes not only EAJA awards under 28 U.S.C. § 2412 but also EAJA awards under 5 U.S.C. § 504, as well as awards pursuant to other statutes – both state and federal – and awards against private parties. It is regrettably impossible to get a more precise breakdown, but clearly EAJA payments have exploded, at least to this group of litigants.

The findings of other researchers corroborate our own. For example, a study by Michael J. Mortimer and Robert W. Malmsheimer of litigation against the Forest Service from 1999 to 2005 found that the Forest Service had paid out a total of at least $6,137,583 in EAJA awards, at

an average payout per year of $876,798.[4] This is a modest sum, but it is for a single agency in a single Department, whereas the reported pre-1994 figures were for the entire federal government.

The attorneys' fees awarded under EAJA represent only one part of the total costs of EAJA to the American taxpayer. The Department of Justice incurs substantial costs in litigation. A recent GAO report calculated that in representing the EPA, Justice spent approximately $1.83 on its own litigation costs per dollar of attorneys' fees paid out, and that number is likely to be similar, if not higher, for other agencies.[5] Individual agencies also incur substantial litigation costs, which include preparing for litigation through pleadings and discovery, submitting evidence to administrative or judicial proceedings, allowing employees to be deposed, and reanalyzing and rewriting environmental impact statements and biological opinions found inadequate by the courts. These expenses are difficult to quantify but are undoubtedly substantial, as is the accompanying drain on agency morale. We believe that our land management, wildlife, and environmental agencies, which are already underfunded and struggling to meet deadlines, are being negatively impacted by this litigation, which is funded by EAJA and possible in part because of EAJA's unique provisions. We don't yet know how much other agencies are being affected by similar litigation, but the same principles apply to them as well. Likewise, though we do not know what other groups may be receiving excessive attorneys' fees, we categorically oppose special treatment for any non-profit organization, regardless of its politics or goals.

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[4] Michael J. Mortimer and Robert W. Malmsheimer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 Journal of Forestry 352, 354 (September, 2011).

[5] U.S. Government Accountability Office, GAO 11-650, *Environmental Litigation Cases Against EPA and Associated Costs Over Time* (2011).

GLSA seeks to amend EAJA to make these repeated lawsuits less profitable, and hopefully less frequent. This will allow our agencies to better fulfill their missions, while keeping the courthouse – and the agency – doors open for millions of less wealthy litigants. It will provide savings not only in EAJA awards but also in litigation costs, at a time when government is anxious to save as much money as possible.

Thank you.

Mr. COBLE. Ms. Ellis.

TESTIMONY OF JENNIFER R. ELLIS, CHAIRMAN, WESTERN LEGACY ALLIANCE

Ms. ELLIS. Mr. Chairman, Members of the Committee, I appreciate the ability to come before you today, and I have come to see why it is they asked me today. I am going to dumb this conversation down a lot. I hope you will appreciate my efforts there.

More than 20 years ago I was a rancher in Idaho when an environmental group declared that its goal was to put myself and other ranchers out of business. Other conservationists who cared for the land had a better goal of how ranchers could change to do their business. This made sense to me. Even though we didn't agree on the outcome all the time, we did agree to sit down at the table.

Our self-appointed enemies brought a new and more aggressive campaign of lawsuits than we had ever seen before, so we formed the Western Legacy Alliance to allow ranchers, farmers, sportsmen, and local communities to defend their livelihoods. I started out 4 years ago, when we started on this project, I thought that EAJA was how environmentalists got the money to file the lawsuits, but it is not. They have other much better sources of money. I thought that EAJA was the law that gave them access to the courts, but it is not. The major environmental laws give them access to the court for standing and to pay their fees. The Endangered Species Act, Clean Water Act, and Clean Air Act are all examples of that.

EAJA seemed to be written just for the environmental groups, but it wasn't. It was written for people like me—as Congressman Conyers and Congressman Cohen have made examples of small businesses, I am that small business—and also for people like my dad, who are Social Security recipients. I had no idea that there were 205 laws on the books that allowed fee shifts to occur, for groups to gain standing and then recoup their fees if they did prove the government was wrong, and none of these 205 laws exempt 501(c)(3) organizations.

In sum, I thought that if we repealed EAJA, then our problems would all be solved. Having spent years now learning about EAJA, I see it doing really good work for the retirees, the veterans, and small businesses. But it is also being used by groups that do not need it, and used in ways that make the controversies in the West and in Tennessee much more difficult on everybody involved than they need to be.

Passing H.R. 1996 will make things better while protecting the proper use of EAJA. And a case out West in the Yellowstone Park is a really good example; maybe you have all heard of it, the snowmobile debacle. Tour businesses sued to overturn the first ban on the snowmobiles and they won. After the Park Service issued a new decision, the environmentalists sued the Park Service and won. The back-and-forth in court was disputing not whether the Park Service was breaking any laws but whether it had considered all of the options. It wasn't about justice, it was about policy choices.

I have always understood that people can push their agendas in court. I just disagree with using my tax dollars to do it. I support the GLSA even though it would prohibit some large business groups from collecting fees in the future. There are also other reasons that I support the GLSA. The bill improves EAJA for its intended users, which have been duly noted. It brings transparency and accountability to the costs of lawsuits. It separates EAJA from environmental policy, which is a completely separate issue. GLSA does these things by increasing allowable fees, focusing EAJA on direct and personal costs to people instead of to organizations, and

reporting the amounts distributed and preventing repeat claims by the same organizations over and over.

EAJA is different from the Clean Air and Clean Water Act and the ESA. Environmental laws support lawsuits about whether the government has done what the law says it must do. EAJA pays for environmental cases if you can show the government messed up the paperwork, which is a pretty easy thing to do, if any of you have seen the NEPA documents and the APA documents. It is a real easy way to block decisions that you just don't like.

I urge the Committee to fix this by passing H.R. 1996 so that tax-exempt organizations have to pay their own way when they take on taxpaying businesses over differences of opinion. And I am actually on the receiving end of the collateral damage done by the misapplication of EAJA awards.

With that, I will stand for any questions. Thank you.

Mr. COBLE. Thank you, Ms. Ellis. I guess you probably came the greatest distance here today, Ms. Ellis, so we commend you for that.

[The prepared statement of Ms. Ellis follows:]

Western Legacy Alliance

House Judiciary Committee Subcommittee
Courts, Commercial and Administrative Law

Hearing regarding:

H.R.-1996- Government Litigation Savings Act

October 11, 2011

Testimony for Western Legacy Alliance will be presented by:

Jennifer R. Ellis-

Jennifer is a cattle rancher and wheat/hay farmer from Blackfoot, Idaho. She has served as the Chairman of WLA since 2007, President of the Idaho Cattle Association in 2009, Chairman of the Sage Grouse Advisory committee, member of the Idaho Fish and Game Advisory Committee, member of three local Sage Grouse Working Groups, Wildlife Committee chairman of Wolf Depredation and currently serves on the Idaho Agricultural Credit board of directors.

Subcommittee on Courts, Commercial and Administrative Law

House of Representatives Committee on the Judiciary

October 11, 2011

Western Legacy Alliance (WLA) would like to thank the Chairman, and the members of the Subcommittee, for this opportunity. Please consider this the written submission of testimony regarding the Government Litigation Savings Act (GLSA) presented on behalf of the membership and board of directors of the WLA. We feel the reforms proposed in GLSA are necessary to stop ongoing abuse of well-intended legislation.

The Western Legacy Alliance sprang out of a need to bring modern, targeted research and public relations to natural resource conflicts on federally-managed lands. A volunteer, grass-roots organization housed in Moreland, Idaho, WLA has been in place since 2007, with membership and support ranging from across the nation. Our mission was the preservation of economically viable access to federally-managed natural resources which are integral to so many rural communities, primarily in the Intermountain West. We advocate for the ongoing multiple-use of Public Lands, as well as for private property rights relative to natural resources, representing farmers, ranchers, sheep producers, sportsmen, recreationists, dairymen and other similarly aligned groups. As our effort has evolved, we hope to empower agencies, state and local governments, and those private individuals who rely so crucially on access to Federally-managed natural resources, by bringing our unprecedented research to bear on the culture of litigation which currently paralyses responsible management in all those areas where Federal regulations apply.

WLA initiated the first serious discussions within the Western Caucus regarding the potential abuse of the Equal Access to Justice Act (EAJA) and other attorney-fee-shifting statutes in 2009. Our legal research unearthed broad and ongoing trends in the use of EAJA claims in the area of natural resources-related litigation, yet brought forth more questions than answers regarding the basis for implementation of EAJA settlements. Most surprisingly, WLA found that there has been no accounting for these awards since 1995. We have continued to fund research which reveals a need for the restructuring of EAJA, research which would result in the introduction of the Open EAJA Act of 2010, and in the Government Litigation Savings Act now before you.

Western Legacy Alliance strongly urges the Committee to move this vital legislation forward. Please consider the following rationale for our support.

Government Litigation Savings Act – Section 2: A (1) Eligibility Parties-Attorneys Fees

This section Adds "who has a direct personal or monetary interest in the adjudication, including because of personal injury, property damage or unpaid agency disbursements" as a requirement for the reimbursement of attorneys fees

We believe that the EAJA was created to protect individuals and small businesses from an overzealous application of law by federal agencies. According to testimony offered by members of the House of Representatives in support of EAJA, the purpose of the bill was to "equal the playing field" when American citizens had to file litigation against the federal government. For example, Congresswoman Chisholm (D-NY) testified that the bill encouraged an "affirmative action approach" to bring in those who had been "locked out of the decision making process by virtue of their income, their race, their economic scale or their educational limitations." Senator Edward Kennedy (D-MA) testified that the bill would ensure that federal agencies followed the will of Congress. Representative Joseph McDade (R-PA) stated that the bill would help to improve a citizen's perception of his relationships with the federal government because it would require federal agencies to justify their actions and to compensate the individual or small business owner when the government is wrong. Clearly, the intent of EAJA was to curb unreasonable and excessive regulations, not to be a tool for adding regulatory burden on small businesses and individuals.

However, as EAJA has evolved, it has become a mechanism by which some special interest groups, usually S01c(3) Non Profit's, have been able to force, and to fund, the implementation of their political and social agendas with regards to environmental, natural resource, and public land management. These groups use unending obstructionist litigation, mainly targeting the unwieldy statutory requirements for establishing Federal policies and actions, rather than the science and methods informing those policies, to hold up necessary and economically productive projects. In cases in which these groups prevail, or as a condition of mutually negotiated settlement in many other cases, they are awarded, under the auspices of EAJA, court costs and attorneys fees, thus funding their next round of litigation. The practical effect of this EAJA established pot of "free" funds for litigation has been to create a litigious phenomenon which takes the management of natural resources away from Congress and the Federal Agencies who are rightfully empowered to implement congressional directive, and thus enabling "legislation from the bench", at taxpayers' expense.

This problem becomes particularly apparent when one considers the sheer volume of litigation against the procedural time frames in the Endangered Species Act ("ESA") or the National Environmental Policy Act ("NEPA"). Neither the time frames in the ESA or the process in NEPA require the federal agencies to reach a particular substantive result; however, litigation over these Acts is filed en masse even though the only action the Court can take is to require the agency to make the decision over again. Thus, the above language is necessary to curb the onslaught of non-substantive appeals and lawsuits filed by special interest groups, and to bring the bill back to its original Congressional intent.

For example, under the ESA, Department of the Interior's Fish and Wildlife Service ("FWS") or the National Oceanic and Atmospheric Administration - Fisheries Division ("NOAA") are required to make a finding on every petition to list a potential threatened or endangered species within 90 days of filing. If such a scientific finding by the federal agencies is not made and published in the Federal Register within that 90 days, the petitioner can file litigation to force such a finding be made. The federal court can require that the federal agency publish its finding—but the court cannot determine if the species should be listed as threatened or endangered by the federal agency. However, even though no substantive finding related to the status of the petitioned species can be made by the court, the petitioner can

nonetheless receive payment of attorney's fees simply because the federal agency missed a time deadline. Clearly this example does not fit with the idea that the payment of attorney's fees was to "equal the playing field" and provide relief to those who had been "locked out of the decision making process by virtue of their income, their race, their economic scale or their educational limitations."

During a previous discussion of EAJA in the Judiciary committee a remarkably insightful comment was made: "EAJA will end up encouraging those with the least financial interest in the outcome to litigate for their own interests and will encourage insubstantial claims." That is exactly what has happened, as is evident by the routine awarding of attorneys fees to non-profit groups who have sued only on the basis of missed deadlines or other processes, rather than on the basis of substance or merits.

(B) In subsection (b) 1:

"Striking $125 an hour and replacing with $175 per hour"

A: "inserting- shall reduce the amount to be awarded, or deny an award, commensurate with pro bono hours and related fees and expenses"

We realize that $125 an hour is indeed low in today's economy to retain an attorney. Social Security benefits plaintiffs, for whom the law was designed, are usually left owing their attorney's after the EAJA award. When small businesses or individuals hire an attorney, money actually changes hands, bills are sent to the client and bills are paid by the client, thus the need for attorney's fees EAJA reimbursement. However, many special interest groups never actually pay a bill as they use "pro-bono environmental law firms" who do not charge them other than minuscule hard cost recovery i.e.: copies, filing fees etc. For example, based upon the IRS 990s for one bro-bono special interest law firm in Boise, Idaho called Advocates for the West, over 60% of its total revenue came from payment of attorneys fees from the federal government . During 2009, PACER court documents for attorneys for Advocates for the West requested $300 per hour for supervising attorneys in the pro-bono firm.

A related problem is that the IRS 990 forms do not match with either (1) the actual documents that are filed in the various court cases or (2) the federal government reaches a "confidential" or sealed settlement agreement on attorney's fees. For example, upon reviewing 40 sampling cases filed in the Federal District Court for the District of Idaho for this same special interest group the actual hourly rate for the attorney's fees was listed only three times. No itemized bills were submitted as part of the court record in these cases, making it impossible to know if the work and hours compensated by EAJA were relevant to the case at hand or were ever performed at all. Likewise, the check disbursements from the Department of Treasury were nonsensical. The pro bono law firm was paid 14 times, the principle partner in the pro bono law firm was paid 4 times and the actual plaintiff paid 2 times. In the above cases the EAJA fees were only litigated once, meaning that only one case had judicial oversight, the others were done in stipulated settlements with no judicial oversight.

Limitation of Award, Section 504

It is WLA's contention that without a limitation on awards to an entity within a calendar year or a monetary cap there is no practical way to bring the attorney-fees-shifting statutes of EAJA back into line

with their Congressional intent. By encouraging frivolous, non-substantive cases to be recompensed by EAJA it encourages multiple filings to realize the "bet on the come" mind set.

For example: If a small group files one lawsuit or appeal a year it has a significant chance that case will not produce revenue. If a group files multiple cases during a year the chances of a settlement or win increase exponentially. According to federal court data bases, in 2009, this same special interest group discussed above filed over 18 federal district court cases and with its "campaign partners" – other non-profit special interests groups who receive attorneys fees from the federal government, filed over 100 cases in 2009 alone. When combined with the ability to convince judges of "special circumstances" thus exceeding the hourly cap, it would only take one case in ten filings to guarantee a financial windfall.

Another example: One 501c3 special interest group filed petitions to review well over 400 species under the Endangered Species Act. Each and every one of those petitions must be answered by FWS within the 90 day window. Each species for which a 90 day finding by FWS is not ultimately submitted is eligible for EAJA recompense to the filing party.

By Congress taking the initiative to solidify the number of cases allowed per year and the amount of recompense allowed in a calendar year it would force groups with multiple-filing intentions to prioritize and de-prioritize the cases they actually file, thus relieving the courts of the more trivial filings. The positive effect of this action, in terms of lost time by federal agency staff, and the subsequent taxpayer saving, would be as significant as the caps themselves.

In further research into mass filings and massive EAJA payments, WLA found some very disturbing inconsistencies in the implementation of the Act, illustrative of our charge of systematic abuse of EAJA in the area of Federal natural resource management. As an example, in a California case involving a proven wrongful death claim against the Federal government, one plaintiff fought for ten years to be awarded $450,000 EAJA compensation for legal fees. By contrast, in a case involving a mere procedural challenge to the Department of Agriculture's regulations for developing land use plans, a case that involved no evidentiary hearing, no discovery, and lasted only 14 months provided the special interest plaintiffs with $ 421,358 in compensation, with their pro-bono attorneys requesting as much as $625 per hour. In another instance, involving litigation over endangered salmon, a 10 page brief netted the filing groups $1,000,000 in EAJA and Judgment Fund fees.

4) Reporting in Agency adjudications:

In early 2009 WLA began asking the pertinent government agencies to provide us with the documentation of attorney fee EAJA awards assessed to their agency. What followed was an astonishing lesson in "passing of the buck". It was absolutely not an intentional non-disclosure by the agencies, but as we found, a complete lack of direction to keep track of several accounting items:

1. EAJA reimbursements from the agency to the prevailing plaintiff
2. Time spent by the agency to provide FOIA's to the plaintiff for research to file the case
3. Attorney time from agency

4. Attorney time from the US attorney's office

5. Attorney time from the Department of the Interior

6. Agency staff time spent preparing case research

7. Agency staff time spent in court

WLA personally encountered the following scenario:

WLA contacted Bureau of Land Management ("BLM") regarding EAJA disbursement for the previous calendar year. We were informed that BLM did not keep track of these payments the US Attorney's offices for the State the cases were filed in kept that information. We contacted the US Attorney's office and were informed that the Department of Justice ("DOJ") housed that information. DOJ informed us that the Department of Treasury, who issued the checks or electronic transfers, kept track of that information. A FOIA request to Department of Treasury was met with the opinion of the FOIA officer that BLM housed that information, not Department of Treasury. So you see the complete circle referenced in the above paragraph.

On January 21, 2009 President Obama issued "Openness in Government", a presidential directive to his agencies. In it he stated that "transparency promotes accountability". Perfectly said and if implemented in the manner called for within the GLSA that exactly will happen.

3: Adjustment of Attorney's Fees

WLA believes that the ability to adjust EAJA caps yearly, based on the Consumer Price index is the most realistic way of balancing the attorney fee issue. Veterans, Social Security benefits claimants and individuals, must have the ability to file a case against the government and be assured that an attorney will indeed take their case based on the knowledge that a fair EAJA recompense will be forthcoming in the event they prevail against the government.

4: Reporting

Reporting and accountability go hand in hand. In order for Congress to be assured of EAJA doing the job the law was intended for these reporting requirements are absolutely necessary.

WLA found in upwards of 1/3 of the EAJA cases the dollar amounts awarded were in sealed documents. Parties names were withheld as were the EAJA awards. It would be WLA's philosophy that any taxpayer dollars spent from the EAJA were absolutely public knowledge.

With the implementation of this reporting measure, Congress will have the ability to truly evaluate the equality of the law, any inequities within judicial districts, and inherent repeat players that could be intent on gaming the system, and which agencies appear to be on the receiving end of the filings. Another crucial part of the reporting would be the ability of the agencies to file true budget requests to Congress. If, for example, the BLM has no idea of how much they paid for EAJA disbursements in a calendar year, how can they possibly submit an accurate budget to the appropriations committee?

Section 3-GAO study

The GAO study is indeed a lynch-pin for the GLSA. In order for Congress to evaluate the success or failure of this program historic data must be gathered. When reporting requirements were dropped we believe that the ATM card type use of the EAJA began. Without proof positive of this phenomenon, rhetoric and supposition will rule over the debate regarding reform. This critical component will lend undeniable proof for substantive and equitable reforms of EAJA.

Summary:

In three years of single issue research done by WLA one disturbing development superimposes itself above the others, foreseen in theory, and now proven in events of the past year. The certain threat of long and costly litigation against almost any and all projects and actions taking place on Federal lands has become a tool for de facto extortion. The ability of large 501c3 special interest groups to file, and fund, reams of lawsuits (our incomplete sampling show well over 2200 in the last 10 years) has resulted in a very untenable situation for individuals and companies dependent upon economic access to Federal lands. Obstructionist groups with a history of effective litigation have earned amount of "litigation clout", which these groups can then use to "extort" money from companies or individuals attempting to complete projects necessary for the energy development and other productive uses of the American people. El Paso Gas Corporation, in order to complete its Ruby Pipeline Project, a natural gas pipeline spanning parts of Wyoming, Utah, Nevada, and Oregon, paid out tens of millions of dollars to various groups for their "cooperation". Baldly put, these particular obstructionist groups "sell" their promise not to litigate against the Federal planning portion of projects of entities which can "donate" enough money toward the furthering of their extremist goals. This only increases the costs to consumers across the country, as the energy companies that fall victim to this type of extortion are forced to recoup their expenses by increasing the cost for their products. Other Federal land users, like ranchers, for example, are price takers, not price makers, and have no means of recouping the money they have lost at being forced to protect their interests in such suits. The cost to the consumers will nonetheless be seen in the long term increase in the price of ranch produced products due to decreased production. Surely it was never the intent of Congress that EAJA would become an avenue for amassing "litigation clout," and the power to coerce money out of one industry or user group for use against another user group!

It is clear that EAJA was meant to have only a negative monetary impact on the government, with no peripheral damage to third parties. This is absolutely no longer the case. Although the suits filed are indeed only against the government agencies, third parties are drawn in to attempt to protect their

livelihoods. Ranchers, for example, must hire attorneys to attempt intervention or file amicus briefs that cost anywhere from $20,000 for an amicus to $100,000 for a full intervention. While the 9th Circuit as abandoned the "only federal defendant" rule and allowed full intervention by third parties with a direct interest in the case, this only allows at its best, a partial involvement on the merits phase of the case and a seat at the table in the remedies phase. Some of our members have incurred the $100,000 attorney bills with no way of recompense and no way of guarantee that all will not be lost when the government settles with the plaintiff. In actuality, many of our members have funded this system in three ways, their tax dollars in EAJA, their personal monies in attorney fees and more tax dollars for the government's defense of the suit. This is truly an inequitable situation and flies in the face of the intent of EAJA allowing monetary damage only to the government.

We assert there is a meaningful and significant disparity to be found in the numbers of suits filed against the government- regarding policy decisions- by all special interest groups. In the course of 9 years the research shows "industry policy challenges" at 70 filings. In the same 9 year period "environmental policy challenges" are counted at over 2200 filings, suits or petitions.

In the end, as we offer our support of the Government Litigation Savings Act, we would also like to point out to the Judiciary Committee that the special interest groups who have been using this law as a way to force their political views on agencies and natural resource users are also the same groups who refuse to participate in collaborative conservation agreements. In the West, many species of flora and fauna have been petitioned for listing under the ESA. USFWS, State Game and Fish Agencies, and stakeholders from all walks of life have come to the table year after year to attempt reasonable conservation without ruining livelihoods and local economies. Many of these aforementioned groups will never sit at the collaborative conservation table to assist in developing a conservation plan, preferring instead to immediately attack that plan in court. We submit that the collection of EAJA fees appears to be their primary purpose. A sampling of pro bono environmental law firms actual attorney fees compensation, as documented in their form 990 returns , indicates over $61,000,000 has been paid in nine years. We do not believe one dollar of that 61 million has been returned to any kind of on-the-ground conservation practices.

Thank you for your time and attention in this vital issue.

Sincerely,

Western Legacy Alliance Board of Directors

Presented by:

Jennifer Ellis

Chairman- Western Legacy Alliance

Mr. COBLE. Mr. Wolfman, good to have you with us. You are recognized for 5 minutes.

TESTIMONY OF BRIAN WOLFMAN, VISITING PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. WOLFMAN. Chairman Smith and Members of the Subcommittee, thank you for the opportunity to appear today in oppo-

sition to H.R. 1996. In almost every particular, H.R. 1996 would undermine the purpose of EAJA to provide court access to citizens, citizens groups, and small businesses subjected to unreasonable and unlawful governmental conduct.

I will focus today on two provisions of H.R. 1996 that would cause the most harm, but first I want to explain why claims that EAJA is being abused are dead wrong. In fact, EAJA is less favorable to a fee-seeking party than virtually any of the other more than 200 Federal fee-shifting statutes.

First, under EAJA, to obtain a fee it is not enough for the plaintiff to prevail in the litigation, as it is under virtually all other fee-shifting statutes. Rather, the government can defeat a fee award entirely if it can show that, despite having lost the case, its position on the merits of the case was substantially justified. The Supreme Court says this means that even when the government takes unlawful action against its citizens, it does not have to pay a fee unless the positions it took in court were unreasonable. This is a powerful defense, and dozens upon dozens of cases deny EAJA fees on this ground. So no rational litigant or lawyer would bring a frivolous or marginal case in the hope of obtaining a fee.

Second, under EAJA, prevailing parties cannot recover their fees at market rates. Under other fee-shifting statutes, prevailing parties are awarded attorneys fees at market rates, which in D.C. and other major cities can range up to $600 per hour or more. But EAJA limits fees to about $180 per hour, after adjustment for inflation. Fees can be enhanced above that rate only when the Supreme Court has said are narrow circumstances involving specialized areas of the law, and even then the fee is not paid at market rates. In light of EAJA's below-market rates, neither litigants nor lawyers would bring marginal cases in the hope of receiving fees.

Let me turn to H.R. 1996's two most concerning provisions. Under H.R. 1996, to obtain an EAJA fee, the fee applicant must have, quote, a direct and personal monetary interest in the case, unquote. This would eliminate EAJA in the most important cases, those that challenge unlawful governmental regulations and conduct that affect the public generally. Take, for example, cases where service organizations and members of the private bar help people who serve our country obtain needed disability benefits from the Department of Veterans Affairs. EAJA is vitally important to the individual veteran whose benefits have been unlawfully denied. But EAJA may be even more important to the thousands or tens of thousands of veterans whose benefits requests are mishandled because the Department of Veterans Affairs has systematically delayed issuing benefit rulings or misapplied disability regulations. H.R. 1996 would make it impossible to obtain fees in cases brought by nonprofit veterans groups challenging such illegal conduct. I set out a number of other examples in my written testimony.

H.R. 1996 would discourage these important cases and unfairly require citizens to bear all of their legal costs when these types of cases are brought.

The next section I want to talk about is that H.R. 1996 would amend EAJA to require a court to reduce or deny fees, quote, commensurate with pro bono hours, end quote. Pro bono refers to work performed by attorneys free of charge for people or charitable orga-

nizations unable to afford market-rate services. The no pro-bono provision is a very bad idea because citizens and citizen groups that hire pro bono lawyers are exactly the parties for whom EAJA was designed. They cannot afford to pay for legal services and may only be able to hire lawyers if there is some chance of a fee down the road if they show that the government acted unreasonably. Hundreds if not thousands of members of the private bar provide their services, for instance, to Social Security and veterans disability claimants, with EAJA as the only monetary inducement to take on these cases.

Nearly 10 years ago I worked with a private lawyer in North Carolina with a case in the Supreme Court. The lawyer was a veteran himself who wanted to give back to those in uniform. He represented another veteran who had been denied service-connected disability benefits. Ultimately, after years of litigation, the Court of Appeals for Veterans Claims found that the government's position was wrong and, quote, not reasonably debatable, unquote. The government then fought us over the EAJA fee itself, which we ultimately won in the Supreme Court.

Under H.R. 1996, there would have been no fight. There would be no EAJA fee because the time of the North Carolina lawyer was provided pro bono. Here you have a man who served his country, serving another man who served his country, who would, if H.R. 1996 becomes law, have to think twice about taking on another veteran's disability case. It is hard to think of a more unfair result, a result that would make it difficult if not impossible for people victimized by unreasonable government action to attract competent counsel.

I would welcome any questions. Thank you.

Mr. COBLE. Thank you, Mr. Wolfman.

[The prepared statement of Mr. Wolfman follows:]

TESTIMONY OF BRIAN WOLFMAN ON H.R. 1996, THE "GOVERNMENT LITIGATION SAVINGS ACT," BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE JUDICIARY COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES

Tuesday, October 11, 2011

Introduction

Good afternoon. I am Brian Wolfman. Thank you for inviting me to testify about H.R. 1996. As I will explain, H.R. 1996 would amend the Equal Access to Justice Act in ways that would harm the American public and undermine the enforcement of laws meant to advance our health, safety, and welfare. In short, H.R. 1996 should be rejected because it would eviscerate a law intended to protect Americans when they face unreasonable action by the federal government.

Since 2009, I have been Visiting Associate Professor of Law and Co-Director of the Institute for Public Representation (IPR) at Georgetown University Law Center. IPR is a law school clinic where students receive hands-on training in litigation, some of which involves the federal government. Prior to moving to Georgetown, I worked at Public Citizen Litigation Group for nearly 20 years, serving the last five years as its Director. At the Litigation Group, among other litigation,

we represented citizens and citizen groups challenging unreasonable or unlawful federal agency conduct — that is, conduct at odds with what this body, Congress, had instructed the agency to do. Finally, before I worked at the Litigation Group, I was a staff lawyer for a rural legal services program in Arkansas. There, my work included representing poor people wrongfully denied social security benefits by the federal government.[1]

As a result of my work in all three positions, I became familiar with what are known as federal fee-shifting statutes, such as the Equal Access to Justice, under which parties prevailing in litigation are awarded attorney's fees and, sometimes, other litigation expenses. I have litigated many issues under these statutes at all levels of the federal judiciary, including as lead counsel in four cases before the Supreme Court of the United States.[2]

The general purposes of fee-shifting statutes are three fold: to

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[1]Further biographical information and my resume is available at http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=FullTime&ID=1326&InfoType=Bio.

[2]*See Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Shalala v. Schaefer*, 509 U.S. 292 (1993); *Melkonyan v. Sullivan*, 498 U.S. 1023 (1991).

encourage the vindication of federal rights (such as those protected in our civil rights, open government, and environmental laws), by enabling citizens to hire lawyers; to provide the government additional incentives to obey federal law; and to fully compensated those whose rights have been violated. In the latter category, two types of cases come to mind: social security and veterans' disability cases against the federal government. In both situations, we want to encourage lawyers to handle these cases so that, when the government has wrongfully denied benefits, federal rights are vindicated and disabled citizens who have served our nation in the work place and in uniform receive the support they deserve.

In Part A below, I discuss the Equal Access to Justice Act's purposes in more detail. Part B reviews key provisions of the Act, both to illustrate how the Act operates and to provide background for understanding how, if enacted, H.R. 1996 would severely undermine the Act's purposes. In Part C, I review the specific provisions of H.R. 1996 and explain why the bill should be rejected, using examples of real-life cases that EAJA was meant to encourage, but that H.R. 1996 is aimed at eliminating.

A. The Purposes of the Equal Access to Justice Act

Generally, when a citizen prevails in litigation against the federal government, the Equal Access to Justice Act (EAJA) is the applicable fee-shifting statute.[3] Other, more specific fee-shifting statutes may apply, such as those under the Freedom of Information Act[4] or the Civil Rights Act's provisions barring employment discrimination.[5] But when no other statute applies, EAJA is the only possible recourse. Two prominent examples of cases where EAJA applies are suits against federal agencies for failing to obey statutory and regulatory mandates and to challenge arbitrary and capricious agency actions under the Administrative Procedure Act,[6] and cases involving disability claims by social security claimants and veterans.[7] A separate provision of EAJA applies to certain administrative adjudications before federal agencies.[8]

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[3]28 U.S.C. 2412.

[4]5 U.S.C. 552(a)(4)(E).

[5]42 U.S.C. 2000e-5(k).

[6]5 U.S.C. 706.

[7]42 U.S.C. 405(g) (social security); 38 U.S.C. 7252 (veterans).

[8]5 U.S.C. 504.

EAJA was first enacted in 1980 for a three-year period beginning on October 1, 1981, based on Congress's finding that individuals, small businesses, and non-profit organizations "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings."[9] In light of the government's "greater resources," EAJA sought "to diminish the deterrent effect of seeking review of, or defending against, governmental action."[10] As the Supreme Court has explained, "[t]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."[11] In addition, Congress wanted to "encourag[e] private parties to vindicate their rights and [thereby to] 'curb[] excessive regulation and the unreasonable exercise of Government authority.'"[12] In 1985,

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[9]Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980).

[10]*Id.* §§ 202(b), (c)(1), 94 Stat. at 2325.

[11]*Comm'r, INS v. Jean*, 496 U.S. 154, 163 (1990).

[12]*Id.* at 164-65 (quoting H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4991).

Congress reenacted EAJA and made it permanent.[13]

One of the key insights of the legislators who gave birth to EAJA was recognition of a relationship between encouraging individuals and entities to challenge unreasonable governmental action and the positive effect that such challenges have in implementing public policy for the benefit of Americans generally. As this Committee put it:

> The bill rests on the premise that a party who chooses to litigate an issued against the government is not only representing his or her own vested interest but is also refining and formulating public policy. . . The bill thus recognizes that the expense of correcting error on the part of the government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable government action and also bear the costs of vindicating their rights.[14]

Because concern over unlawful and unreasonable government conduct is not the province of any party or ideology, historically, support for EAJA has been bi-partisan. Indeed, as the initial three-year experiment was coming to end in 1984, Congress voted unanimously to

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[13] Pub. L. No. 99-80, 99 Stat. 183 (1985).

[14] H.R. Rep. No. 96-1418, 96th Congress, 2nd Sess., *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-89 (1980).

make EAJA permanent.[15]

Senator Charles Grassley explained his support for the legislation by noting that before "this landmark legislation" was enacted in 1980, small businesses "were faced with a Hobson's choice—either to fight unjustified Government enforcement or regulatory actions at great personal or financial cost, or to simply capitulate in the face of the meritless action."[16] Senator Howell Heflin made similar points:

> This law provides the average citizen with the resources to fight government overregulation. It further serves as a strong deterrent to arbitrary government action. . . As a former Chief Justice of the Supreme Court of Alabama, I fervently believe that everyone is entitled to his or her day in court. We cannot continuously subject the citizens of this great country to the demands of government regulations and massive resources of regulators without providing them with the resources to fight regulations which may be unjust. This legislation provides more than a forum — it makes justice more accessible.[17]

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[15]*See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134.

[16]131 Cong. Rec. S6248-01 (May 15, 1985).

[17]131 Cong. Rec. S9991-02 (July 24, 1985). Similar examples of support for EAJA from both sides of the aisle abound. *See, e.g.,* 131 Cong. Rec. S9991-02 (July 24, 1985) (Sen. Thurmond); 131 Cong. Rec. S9991-02 (July 24, 1985) (Sen. Dole); 131 Cong. Rec. S15475-01 (Nov. 14, 1985) (Sen. Domenici); 141 Cong. Rec. S9880-01 (July 13, 1995) (Sen. Bond); 142 Cong. Rec. S3242-02 (March 29, 1996) (Sen. Bond); 142 Cong. Rec. S2309-01 (Mar. 19, 1996) (Sen. Murkowski); 131 Cong. Rec. S15475-01 (Nov. 12, 1985) (continued...)

B. EAJA's Provisions

EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in court or in adversary administrative proceedings against the federal government, unless the court or agency adjudicator finds that the position of the United States "was substantially justified or that special circumstances make an award unjust."[18] An individual is eligible for fees if his or her net worth does not exceed $2 million, while a business is eligible if its net worth does not exceed $7 million and it had 500 or fewer employees when the action was commenced.[19] Certain charitable organizations and cooperatives are eligible regardless of size or net worth.[20] "Fees and other expenses" are defined to include "reasonable attorney or agent

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[17](...continued)
(Sen. Baucus); 131 Cong. Rec. H367-01 (Feb. 7, 1985) (Rep. Morrison); 131 Cong. Rec. S1151-01 (Feb. 6, 1985) (Sen. Bumpers).

[18]5 U.S.C. 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

[19]5 U.S.C. 504(b)(1)(B); 28 U.S.C. 2412(d)(2)(B).

[20]*Id.*; 5 U.S.C. § 504(b)(1)(B). Originally, the net-worth limits for individuals and businesses were $1 million and $5 million, respectively. *See* Pub. L. No. 96-481, §§ 203(a)(1), 204(a), 94 Stat. at 2326, 2328. The current eligibility limits were set in 1985, over 25 years ago. *See* Pub. L. No. 99-80, §§ 1, 2, 99 Stat. at 185.

fees."[21]

Congress has enacted "well over 100" fee-shifting statutes,[22] but EAJA is unlike almost all of the other fee-shifting statutes in two critical respects.

First, under EAJA, to obtain a fee it is not enough for the plaintiff to prevail in the litigation or administrative proceeding, as it is under virtually all other fee-shifting statutes.[23] Rather, under EAJA, the government can defeat a fee award entirely if it can show that, despite having lost the case, its position on the merits of the case was "substantially justified."[24] The government is substantially justified, and thus immune from fee liability, where it can show that its position had a reasonable basis in law and fact.[25] Put the other way around, even when the government loses its case — that is, even when the

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[21]28 U.S.C. 504(b)(1)(A); *see also* 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses" to include "reasonable attorney fees").

[22]*Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) (appendix including list of federal fee-shifting statutes).

[23]*See, e.g.*, 42 U.S.C. 1988 (civil rights cases); 42 U.S.C. 2000e-5(k) (employment discrimination cases); 5 U.S.C. 552(a)(4)(E) (Freedom of Information Act cases).

[24]28 U.S.C. 2412(d)(1)(A).

[25]*See Pierce v. Underwood*, 487 U.S. 552, 563-68 (1988).

government takes unlawful action against one or more of its citizens — it does not have to pay a fee unless the positions it took in court or before an administrative tribunal were unreasonable. This is a powerful defense, and dozens upon dozens of reported cases (and many more unreported cases) deny winning plaintiffs EAJA fees on substantial-justification grounds.[26] In light of the substantial-justification defense, no rational litigant or lawyer would bring a frivolous or marginal case in the hope of obtaining a fee.

Second, under EAJA, prevailing parties cannot recover their attorney's fees at market rates. Under almost all other fee-shifting statutes, prevailing parties are awarded attorney's fees at market rates, which are calculated by multiplying the number of hours reasonably spent on the case by the hourly rate the lawyer could command in the relevant market if he or she charged fees to private,

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[26] *See, e.g., Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011); *Fruitt v. Astrue*, 418 Fed. Appx. 707 (10th Cir. 2011); *Hardesty v. Astrue*, 2011 WL 2133651 (7th Cir. 2011); *Cruz v. Comm'r Social Sec.*, 630 F.3d 321 (3rd Cir. 2010); *Hill v. Gould*, 555 F.3d 1003 (D.C. Cir. 2009); *Lord v. Napolitano*, 324 Fed. Appx. 115 (2d Cir. 2009); *Senville v. Madison*, 331 Fed. Appx. 848 (2d Cir. 2009); *Sardo v. Dep't Homeland Sec.*, 284 Fed. Appx. 262 (6th Cir. 2008); *Beeks v. Comm'r Social Sec.*, 424 Fed. Appx. 163 (3d Cir. 2007); *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005); *Davidson v. Veneman*, 317 F.3d 503 (5th Cir. 2003); *Oro Vaca, Inc. v. Norton*, 55 Fed. Appx. 433 (9th Cir. 2003) (alternative holding).

fee-paying clients.[27] But EAJA limits fees to $125 per hour, adjusted for increases in the cost of living since enactment of the $125 per hour rate in 1996.[28]

Specifically, an administrative tribunal authorized by regulation to do so, may award fees above the statutory cap if "an increase in the cost of living ... justifies a higher fee."[29] Courts and authorized administrative tribunals generally award cost-of-living adjustments as a matter of course when market rates exceed the unadjusted statutory cap.[30] Because the cost of legal services has greatly outstripped inflation generally, the inflation-adjusted fee cap — currently about

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[27] *See, e.g., Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

[28] *See* Pub. L. No. 104-121, §§ 231-233, 110 Stat. 847,862-64 (1996). Prior to 1996, the unadjusted fee cap was $75 per hour. The increase from $75 per hour to $125 per hour reflected the increase in the cost of living between EAJA's original October 1, 1981, effective date and the increase's March 1996 effective date. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers, available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (showing 66.7% cost-of-living increase from October 1981 through March 1996).

[29] 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

[30] *See, e.g., Meyer v. Sullivan*, 958 F.2d 1029, 1033-35 (11th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504-05 (8th Cir. 1990) (citing cases); *see also Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988) (noting repeatedly that the fee cap is "adjusted for inflation").

$180 per hour — is far below hourly legal fees in most legal markets.[31]

Courts and authorized administrative tribunals also may award fees above the cap — whether inflation-adjusted or not — based on the presence of a "special factor, such as the limited availability of qualified attorneys for the proceedings involved."[32] The Supreme Court has held that this statutory formulation refers to "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question — as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation."[33] Following the Supreme Court's lead, this basis for enhancement generally has been rejected by the lower courts and has been employed only rarely in cases involving certain complex legal specialities.[34] Even in the rare circumstance where a court recognizes a speciality that might qualify for rate

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[31] *See* Adjusted Laffey Matrix, available at http://laffeymatrix.com/see.html (showing current attorney fee rates in the District of Columbia, ranging from $166 per hour for paralegals and law clerks to $734 per hour for lawyers with 20 or more years of experience); *see also, e.g.*, *Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 660 (7th Cir. 2007) (rates up to $400 per hour).

[32] 5 U.S.C. 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

[33] *Pierce*, 487 U.S. at 572.

[34] *See Scarborough v. Nicholson*, 19 Vet. App. 253 (Vet. App. 2005) (reviewing case law).

enhancement, to receive a rate above the statutory cap, the fee applicant must show that legal services could not have been obtained at the capped rate.[35]

In sum, unlike fee applicants under other fee-shifting statutes, the vast majority of EAJA fee applicants are limited to the inflation-adjusted statutory cap, and, even in the rare circumstance where the statutory cap is exceeded, EAJA fees are not awarded at market rates. Thus, as with the substantial-justification defense, in light of EAJA's below-market rates, neither litigants nor lawyers would bring marginal cases in the hope of receiving EAJA fees.

C. Section-by-Section Review of H.R. 1996

In Part A, I explained that EAJA seeks to curb unlawful government conduct by encouraging citizens, citizen groups, and small businesses to oppose unreasonable governmental conduct. In Part B, I explained how EAJA works and showed that, in light of EAJA's unique characteristics — in particular, the government's substantial-justification defense and EAJA's below-market fee rates — EAJA is less

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[35] *See, e.g., Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991).

susceptible to abuse than any other federal fee-shifting statute. This part of my testimony reviews the provisions of H.R. 1996 and shows that their enactment would undermine EAJA's purposes and harm the American public.

1. Requirement of "direct and personal monetary interest"

Under H.R. 1996, to be a "prevailing party" and be eligible to obtain an EAJA fee, the fee applicant must have "a direct and personal monetary interest in the civil action [or in the administrative adjudication], including because of personal injury, property damage or unpaid agency disbursement." The purpose of this provision is to eliminate EAJA eligibility for the most important cases — those that seek non-monetary injunctive relief by challenging unlawful government regulations and conduct that affect the public on an on-going basis.

Take, for instance, the situation of veterans who all too often get into legal disputes with the Department of Veterans Affairs over their entitlement to benefits for service-related disabilities. To be sure, EAJA is vitally important to the individual veteran whose benefits have been

unlawfully denied.[36] But EAJA may be even more important to the thousands or tens of thousands of veterans whose benefits requests are never processed or mishandled because the Department of Veterans Affairs has systematically delayed issuing benefit rulings or misapplied disability regulations.[37] H.R. 1996 would make it impossible to obtain fees in cases brought by non-profit veterans groups challenging such illegal conduct, thus discouraging the filing of these important cases and unfairly requiring the plaintiffs to bear all of their legal costs when those types of cases are brought.

Beyond veterans cases, suits challenging unlawful regulatory conduct often protect Americans' health and safety. A few examples help illustrate my point. In the 1990's, Congress passed a series of laws to enhance safety in the commercial trucking industry, to protect the truck drivers themselves as well as the driving public that shares the

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[36] *See* Annual Report, United States Court of Appeals for Veterans Claims, October 1, 2009 to September 30, 2010, at 3 (over 2600 EAJA awards in veterans benefits cases in fiscal year 2010), available at http://www.uscourts.cavc.gov/documents/FY_2010_Annual_report_June_27_2011.pdf.

[37] *See, e.g., Military Order of Purple Heart of USA v. Secretary of Veterans Affairs*, 580 F.3d 1293 (Fed. Cir. 2009); *Paralyzed Veterans of America v. Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003); *Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000).

roads with commercial rigs. Congress required the Department of Transportation to issue by specified dates certain safety regulations — rules concerning truck drivers' hours of service, driver training, and background checks for new truck drivers, to name a few. By 2003, when a suit was filed against the Department, not a single rule had been issued, even though some were a decade or more overdue.[38]

After the suit was filed, the Department agreed to issue all of the delayed safety rules according to a court-enforced schedule. Thereafter, the Department issued the rules, two of which were challenged as unlawful. The first challenged rule concerned minimum training standards for entry-level drivers of commercial vehicles, including heavy trucks and buses. Instead of requiring entry-level truck and bus drivers to receive training in topics such as backing up, shifting, changing lanes, parking, controlling skids, and driving on mountainous roads — the operational skills and knowledge necessary to safely operate a commercial vehicle — the rule required drivers to receive training in only four tangential areas of driver qualifications: hours- of-

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[38] *See In re Citizens for Reliable and Safe Highways,* No. 02-1363 (D.C. Cir.) (petition available at http://www.citizen.org/documents/Petition%20Final.pdf).

service requirements, driver wellness, and whistleblower protection. Recognizing that the agency had flouted Congress's intent, the United States Court of Appeals for the D.C. Circuit held that the agency's final rule was arbitrary and capricious, in part because the government's own studies showed that a rule that actually required new drivers to learn how to drive would save lives *and* money by eliminating costly truck accidents caused by untrained drivers.[39] The agency has since issued a lawful rule, and new truck drivers are required to undergo meaningful training, providing significant protection to the American driving public.

In the suit over the other truck safety rule, the Department of Transportation had been directed to issue regulations to curb truck-driver fatigue, in light of mounting evidence that tired truckers were the cause of an increasing number of fatal truck crashes and serious crash-related injuries. The Department's rule — issued years late — actually *increased* the number of daily and weekly hours a commercial truck driver could lawfully drive. Truck drivers and safety

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[39] *See Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 1136 (D.C. Cir. 2005).

organizations sued, seeking invalidation of the rule and instructions to the agency to issue new regulations that would take exhausted truck drivers off the road.

This litigation was difficult and hard-fought. The federal agency's docket on the rule included more than 56,000 entries, and the issues — involving studies about sleep deprivation, a complex cost-benefit analysis, and difficult legal questions — could not be mastered overnight. So, as you might imagine, the plaintiffs needed skilled lawyers on their side. In the end, the government's position was rejected not once, but twice, by the Court of Appeals for the D.C. Circuit.[40] Only after those two defeats and the briefing of a third appeal, did the government agree to issue rules consistent with Congressional directives. H.R. 1996 would allow the government to impose all the legal costs of this litigation on the plaintiffs, even though it was the government that failed — and failed miserably and repeatedly — to obey the law.

EAJA is also important in cases challenging violations of

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[40] *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007); *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004).

environmental laws and regulations. Take, for instance, a case involving the wild and scenic McKenzie River, known for the prized trout and salmon fisheries that made the McKenzie River drift boat famous. In relicensing two dams that were originally constructed without fish passage on the River, the Federal Energy Regulatory Commission (FERC) refused to abide by the Interior Department's prescriptions for fish ladders despite the plain language of the governing statute requiring it to incorporate those prescriptions. A federal court of appeals held that FERC violated the law by failing to heed the expert wildlife agency, which required modifications that, in the end, sustained the thriving fishery.[41]

In each of these cases, EAJA held out the only hope of an attorney's fee for the plaintiffs. And even in those cases, under EAJA, the plaintiffs would not receive a market-rate fee, and the government could, if it chose, avoid a fee altogether if it could show the court that its position on the merits had been substantially justified. As it turned out, in two of the three cases truck safety cases, the government agreed

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[41] *See American Rivers v. F.E.R.C.*, 187 F.3d 1007 (9th Cir. 1999).

to pay a modest fee. In the McKenzie River case, the plaintiffs received less than $50,000 in fees.

Make no mistake: The purpose of this provision is to render EAJA inapplicable in cases like the ones described above, where EAJA is most needed. In each case, under H.R. 1996, no fee would be available because the suits sought injunctive relief, not "monetary" relief in which the plaintiff had a "direct and personal interest." The Committee should reject this provision.

2. Elimination of Attorney's Fees for "Pro Bono" Hours

H.R. 1996 would amend 5 U.S.C. 504(a)(3) and 28 U.S.C. 2412(d)(1)(C) to include what I will call the "no-pro-bono provision." Under it, administrative tribunals and courts are required to "reduce the amount to be awarded under [EAJA], or deny an award, commensurate with pro bono hours and related fees and expenses... ." The term "pro bono" is short for the Latin phrase "pro bono publico," meaning, literally, "for the public good." With regard to legal services, the term generally refers to work performed by attorneys free of charge or at a reduced rate for people or charitable organizations unable to

afford market-rate services.[42]

At a minimum, this provision of H.R. 1996 would eliminate all fees in the cases discussed in the previous section of this testimony, where the lawyers worked for non-profit organizations or private law firms and took cases on a pro bono basis, with no payment from their clients. The no-pro-bono provision is a very bad idea because citizens and citizen groups that hire pro bono lawyers are exactly the parties for whom EAJA was designed. They cannot afford to pay for legal services and may only be able to hire lawyers if there is some chance of a fee down the road if they show that the government acted unreasonably.

To repeat Senator Grassley's admonition: We need EAJA to prevent our citizens from facing "a Hobson's choice—either to fight unjustified Government enforcement or regulatory actions at great personal or financial cost, or to simply capitulate in the face of the

[42] *See* Law.com Legal Dictionary, definition of "pro bono," available at http://dictionary.law.com/Default.aspx?selected=1624 ("legal work performed by lawyers without pay to help people with legal problems and limited or no funds, or provide legal assistance to organizations involved in social causes such as environmental, consumer, minority, youth, battered women and education organizations and charities.")

meritless action."[43] The no-pro-bono provision will put citizens in the very Hobson's Choice that Senator Grassley was trying to avoid when he urged his colleagues to support EAJA.

Equally if not more troubling is the serious prospect that the no-pro-bono provision will discourage the representation of veterans and social security disability claimants. A 1998 GAO Report found that, in 1994, cases involving the Department of Health and Human Services (social security disability cases) and the Department of Veterans Affairs (veterans disability cases) involved 98 percent of EAJA applications submitted and 87 percent of the dollars paid in EAJA awards.[44] Though current data is not available, similar patterns likely persist. As the Social Security Administration explains, that agency "is one of the largest administrative judicial systems in the world" and "issues more than half a million hearing and appeal dispositions each

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[43]131 Cong. Rec. S6248-01 (May 15, 1985).

[44]GAO, "Equal Access to Justice Act: Its Use in Selected Agencies," HEHS-98-58R, at 5 (Jan. 14, 1998), available at http://archive.gao.gov/paprpdf1/159815.pdf.

year."[45] This massive adjudicatory system leads, in turn, to large numbers of civil actions seeking judicial review of agency decisions, all of which are subject to EAJA. Moreover, the U.S. Court of Appeals for Veterans Claims, which adjudicates veterans disabilities claims, has granted more than 2,500 EAJA applications in each of the last three years.[46]

Although in some veterans disability cases, lawyers may receive a fee of up to 20% of the veterans past-due benefits,[47] I have been informed by the Executive Director of the National Legal Services Program that approximately one-half of all veterans disability cases are handled entirely pro bono by members of the private bar and veterans assistance organizations, with EAJA the only possible source of a fee. EAJA serves as a substantial incentive in recruiting lawyers to take on pro bono representation of veterans, and, thus, the no-pro-bono

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[45]Social Security Online, Hearings and Appeals, available at http://www.ssa.gov/appeals/.

[46]Statistical reports of the U.S. Court of Appeals for Veterans Claims, including data on the number of EAJA applications filed, granted, and denied, are available at http://www.uscourts.cavc.gov/annual_report/.

[47]*See* 38 U.S.C. 5904.

provision will affirmatively harm veterans who have been wrongfully denied disability benefits after serving our country.

As in the veterans context, the Social Security Administration may withhold a percentage of a claimant's past-due benefits as a fee.[48] Having handled social security disability cases, however, I know from personal experience that the private bar and non-profit legal services organizations often provide services on a pro bono basis, with EAJA serving as the only potential basis for a fee. Moreover, under the Supplemental Security Income, or SSI, program,[49] which governs disability claims for people living in poverty, the Social Security Administration is barred from withholding a fee from the claimant's past-due benefits.[50] In those cases, claimants are unable to hire lawyers on account of their poverty, and lawyers must provide their services pro bono, with EAJA providing the only possibility that the lawyer will be paid. In sum, the no-pro-bono provision would prove a disaster for social security claimants.

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[48] *See* 42 U.S.C. 406.

[49] *See* 42 U.S.C. 1381 *et seq.*

[50] *See Bowen v. Galbreath*, 485 U.S. 74 (1988).

For all of these reasons, the Committee should reject H.R. 1996's no-pro-bono provision.

3. Adjustments and Limits on Fee Rates and Amounts

H.R. 1996 would amend EAJA to limit the amounts that may be awarded. In general, these amendments would undermine EAJA's purposes and should be rejected.

First, H.R. 1996 would amend 5 U.S.C. 504(b)(1)(A)(ii) and 28 U.S.C. 2412(d)(2)(A)(ii) to raise the nominal fee cap from $125 per hour to $175 per hour. Although that would appear generous, it does no more than approximate the current inflation-adjusted fee cap, which, as noted above (at 11-12), is about $180 per hour. The real concern here, however, is that future cost-of-living increases would be at the discretion of the Director of the Office of Management and Budget, rather than mandatory. As explained earlier (at 11 & note 30), in recognition of the huge gulf between the EAJA fee cap and market rate fees, courts have granted cost-of-living fee adjustments as a matter of course. Granting OMB discretion *not* to adjust fees for increases in the cost of living means that EAJA fee recoveries could suffer further

erosion, undermining EAJA's purpose of attracting competent counsel to challenge unreasonable governmental conduct.

Second, H.R. 1996 would repeal EAJA's "special factor" enhancement, which, as discussed above (11-13), authorizes fee rates above the normal EAJA cap for cases that demand expertise in highly specialized areas of the law, and then only where the plaintiff can show that attorneys could not be retained in the relevant market at the regular EAJA rate. Eliminating this safety valve will make it difficult for plaintiffs to find lawyers willing to challenge unreasonable government actions in some instances, and it should therefore be rejected.

Third, H.R. 1996 would add 5 U.S.C. 504(a)(5) and 28 U.S.C. 2412(d)(1)(E), to provide that no individual or entity may be awarded fees of more than $200,000 in any one civil action or administrative proceeding and that no party may receive an EAJA award for more than three civil actions or administrative adjudications initiated in the same calendar year. These provisions are irrational and should be rejected.

To be sure, EAJA-eligible cases do not often incur more than

$200,000 in fees or other expenses, particularly given the substantially below-market fee rates generally required by EAJA. Nor do many plaintiffs file more than three EAJA-eligible cases in a calendar year. But some cases are necessarily lengthy and complex, requiring thousands of hours of work, and, logically, in those cases, the fee awarded should be commensurate with the work required. After all, EAJA already demands that the administrative tribunal or court award only "reasonable" fees,[51] the attorneys' time and rates requested must be itemized and explained,[52] and the decision maker may reduce the fee whenever the prevailing party has unreasonably drawn out the case.[53]

Moreover, a party may be required to file multiple cases in a calendar year. In one of my EAJA cases, the plaintiff, a small business that provided security services for the Department of Homeland Security, succeeded in showing that the government had breached its contract to provide services at Los Angeles International Airport. After

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[51] 5 U.S.C. 504(b)(1)(A); 28 U.S.C. 2412(d)(2)(A).

[52] 5 U.S.C. 504(a)(2); 28 U.S.C. 2412(d)(1)(B).

[53] 5 U.S.C. 504(a)(3); 28 U.S.C. 2412(d)(1)(C).

about a decade of litigation, with the government fighting tooth and nail, the client obtained an EAJA fee.[54]

Assume that this client had provided similar services at five other airports in California and that the government had breached contractual provisions in those five contracts, requiring the filing of five additional cases. Under the amendment sought by H.R. 1996, if all six cases were initiated at the same time, EAJA fees would be available in only three of them. That makes no sense. Assuming the client prevailed and was otherwise eligible under EAJA's strict requirements, fees should be forthcoming because the government's unreasonable behavior triggered the need for all six cases. Under H.R. 1996, however, the client either would have to drop three cases, wait for the next calendar year to initiate the cases (assuming that they would still be timely), or prosecute all the cases despite the possibility that EAJA fees would not be available in some of the cases. In short, a provision aimed at undermining the rights of individuals or groups who need EAJA the most because their rights have been violated repeatedly is nonsensical

[54] *See Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008).

and should be rejected.

4. Net-Worth Limit for Charitable Organizations.

As noted earlier (at 8), an individual is eligible for EAJA fees if his or her net worth does not exceed $2 million, while a business is eligible if its net worth does not exceed $7 million and it had 500 or fewer employees when the action was commenced.[55] Non-profit charities are not subject to the limits applicable to for-profit businesses. And for good reason. Although the $7 million limit has remained the same since 1985 and should be adjusted upward to account for inflation, once a for-profit business reaches a certain size, it can be expected to cover its costs, including its legal costs. A charity, on the other hand, is expected to dedicate its resources to its mission and to maintain adequate reserves so that, when fundraising becomes difficult (as it has for many charities in recent years), it can continue to serve that mission. Thus, as Congress wisely recognized in 1980 and 1985, EAJA's eligibility caps should not apply to non-profit organizations, such as veterans organizations that represent disability claimants and

[55] 5 U.S.C. 504(b)(1)(B); 28 U.S.C. 2412(d)(2)(B).

organizations that seek to advance consumer health and safety, environmental protection, or civil rights.

5. Administrative Conference Reports and GAO Study

H.R. 1996 requires the Administrative Conference of the United States to issue annual reports on the number, nature, and amounts of EAJA awards in courts and administrative tribunals. It also requires a audit report by the General Accountability Office on EAJA implementation for the years 1995 through the end of the year in which H.R. 1996 is enacted.

Neither of these reports are objectionable in themselves, and they may provide useful information by identifying agencies whose unlawful conduct tends to give rise to EAJA awards. The requirement that the reports issued by the Administrative Conference be available online and contain searchable databases of EAJA awards is sensible.

But the Administrative Conference reports and the GAO study are odd features of *this* legislation. Presumably, they appear in H.R. 1996 because its proponents believe that they do not have enough data about how EAJA operates, including especially in the period from 1995 to the present. Given this lack of data, one would think that the

Committee would have required that the data be collected *first*, deciding later whether to amend EAJA to deal with concerns, if any, revealed by the data. But the Committee has taken a different and, in my judgment, misguided approach, by making assumptions about the uses (and supposed abuses) of EAJA and the costs of EAJA awards and seeking drastic EAJA amendments *before* Congress has received the comprehensive data that the Administrative Conference reports and the GAO study would provide. That puts the cart well before the horse.

For this reason, as well as the many others discussed above, I urge the Committee to reject H.R. 1996.

Mr. COBLE. Now, we try to comply with the 5-minute rule as well, so if you all will keep your answers as tersely as you can, we would appreciate that, we can move along.

Mr. Axelrad, will H.R. 1996 adversely affect the ability of people seeking Social Security benefits and veterans benefits to collect what the government owes them?

Mr. AXELRAD. No, it would not.

Mr. COBLE. Your microphone is not on.

Mr. AXELRAD. Oh, I am sorry, excuse me. H.R. 1996 would not affect the right of the individual to recover the award that the court or administrative tribunal provides to a Social Security beneficiary. The difference is that EAJA as of now has a special incentive—depending on where the attorney is located actually, because the courts are divided on this—to pay attorneys more; and so the cap that is written into EAJA is often honored in the breach, so the money will go to an attorney. It doesn't affect the rights of the individual to actually get the benefits of the award that the court determines.

Mr. COBLE. Thank you, sir. Mr. Baier, how does the EAJA in its current form disrupt the balance, as you say in your written testimony, in environmental and conservation policymaking?

Mr. BAIER. I am sorry, Mr. Chairman, I am having trouble hearing in this room. The last part of your——

Mr. COBLE. I will repeat it. How does the EAJA in its current form disrupt the balance, as you indicate in your written testimony, in environmental and conservation policymaking?

Mr. BAIER. It encourages and incentivizes lawsuits over procedural issues, and by procedural issues what I mean are missing deadlines. That is the primary challenge to the way it works. These are procedural deadlines that are imposed primarily under the Endangered Species Act, which are physically and humanly impossible for the Fish and Wildlife Service to at times meet. And the litigation that we are concerned about that has created this imbalance is primarily over procedural issues that relate to missing deadlines and paperwork issues.

Mr. COBLE. I thank you, sir.

Ms. Ellis, when an environmental group sues the Federal Government, you discussed how ranchers in your organization end up paying three times for the same litigation. Elaborate on that, if you will.

Ms. ELLIS. Yes, Mr. Chairman, that is what I referenced as collateral damage. When EAJA was enacted in 1980, it said that there would be no peripheral damage to anyone outside the government, the only hit to a pocketbook was going to be to the government, when in actuality now I hold permits on Federal land that I am allowed to under the Taylor Grazing Act. When environmentalists bring challenges to those permits, they don't challenge me personally, they challenge the agency, we will use BLM as the example. So when they do that, they cannot—BLM attorneys cannot actually represent the losses that would happen to me if the change being requested by the plaintiff were enacted, and so I have to hire an intervening attorney that usually costs, for a good one right now, $400 an hour. So in order to have my interests represented when this lawsuit comes forward, I have to hire that attorney. I am from the Ninth Circuit, and usually they will not allow intervening attorneys in on the merits phase of the case, only in on the remedies phase. So I pay for my intervening attorney, then through my tax dollars I am paying for the agency attorney, the DOJ attorney, all of the staff time involved from the BLM conservation officers, and everybody preparing for the case. And then

my tax dollars pay the EAJA award if they are found to be the winner in the complaint.

Mr. COBLE. I thank you. Let me try to beat that red light, Mr. Wolfman. From your written testimony it seems that you basically support the reporting provisions of H.R. 1996, but that the bill puts the cart before the horse. What evidence, if any, could convince you to support eliminating the exception to EAJA for multimillion-dollar organizations?

Mr. WOLFMAN. Well, I don't know that there is any, but I would like to see what the——

Mr. COBLE. Pull that microphone a little closer to you, Mr. Wolfman.

Mr. WOLFMAN. I am sorry, Mr. Chairman.

Mr. COBLE. It is okay.

Mr. WOLFMAN. I don't know. I would like to see the evidence first. What I was saying in my testimony is, I am all for transparency, and I do agree that it was unfortunate that, after 1995, we did not have an annual report. I myself used it frequently. It was a useful document, and there is nothing wrong with that. What I was saying in my testimony is I find it odd people are complaining about a paucity of data, but they are willing to change the substantive law of EAJA without having the data. That puts the cart before the horse.

Mr. COBLE. I gotcha. I see that the red light appears. We have been joined by the distinguished gentleman from South Carolina, Mr. Gowdy. Good to have you with us, Trey. And Mr. Cohen, you are recognized for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman. Mr. Axelrad, the first question that the Chairman asked you was about people getting their benefits, and I think it was veterans, and you said they get their benefits, if I am correct, but they just—the attorney wouldn't get their attorneys fees; is that kind of what you said?

Mr. AXELRAD. What I meant to say, I can't exactly quote myself, is that the individual who receives an award receives the entire award.

Mr. COHEN. Right.

Mr. AXELRAD. And so the issue is for—and the changes in the terminology go to the compensation for the attorney, not the individual who receives the award.

Mr. COHEN. Right. And I can get—where are you from?

Mr. AXELRAD. Where am I from?

Mr. COHEN. Yeah.

Mr. AXELRAD. Originally from Uniontown, Pennsylvania. I have lived here for quite some time.

Mr. COHEN. All right. Well, if I wanted to go to Uniontown, Pennsylvania, and the law said I could do it but said I couldn't have transportation, I would have to walk there. It would make it a lot harder to get to Uniontown. If your attorney can't get an expectation of getting a fee, you are not going to get an attorney, and if you can't get an attorney, you are not going to get a fee.

Mr. AXELRAD. Let's take the Social Security example that you proposed. There actually is a separate fee provision for Social Security benefits. What EAJA does, it provides suspenders when there is already a belt. But I am not suggesting that EAJA not apply to

Social Security cases. All I am suggesting is that the provisions of EAJA have been broadened so that the exception has almost become the rule. The cap is being pierced, the 501(c)(3) organizations——

Mr. COHEN. You mean the cap of a hundred and a quarter or so an hour?

Mr. AXELRAD. Beg pardon?

Mr. COHEN. The cap of the dollar amount?

Mr. AXELRAD. Right now it is at $125 an hour.

Mr. COHEN. Right. And Ms. Ellis just said you can't get a good lawyer in Idaho for $400. So how are you going to get a good lawyer in Washington for $126?

Mr. AXELRAD. Social Security decisions, for example, are based on the administrative record, I am sure there are—the new cap under H.R. 1996 would be $175 an hour. I don't think there would be any difficulty whatsoever, and in fact——

Mr. COHEN. Are you a lawyer, sir?

Mr. AXELRAD. Oh, yes.

Mr. COHEN. But you don't practice?

Mr. AXELRAD. I don't litigate. I do have a very limited practice.

Mr. COHEN. Even in poor old Memphis, Tennessee, the most poverty stricken of the 60 major cities, unfortunately, you can't get a lawyer to go to traffic court for you for $175.

Mr. AXELRAD. I think there may be a misapprehension on the 501(c)(3) organizations. All that H.R. 1996 does is it provides the same net-worth cap that applies to other entities. It is not saying that the impoverished organization can't avail itself of EAJA. It is the one that has a high net worth that is not able to pierce the cap——

Mr. COHEN. Let me ask you a question. In your testimony——

Mr. AXELRAD [continuing]. Under the bill.

Mr. COHEN. Thank you, sir. In your testimony you say these limitations and conditions have not been successful in cabining—which is a new word for me, I guess, cabining; I will work on it—awards, and have led to substantial, unproductive, tangential litigation. What is the substantial, unproductive, tangential litigation you are referring to?

Mr. AXELRAD. Over whether the——

Mr. COHEN. Give me a case.

Mr. AXELRAD. Well, I cite several in my testimony where the issue is whether the Supreme Court's comment that the kind of specialty that would warrant piercing the cap is something like patent law where there is special expertise needed.

Mr. COHEN. Right.

Mr. AXELRAD. Well, some courts have said that litigating Social Security cases is a specialty that sometimes warrants piercing the cap. Other courts have disagreed. So the courts get into litigation over exactly what is the kind of specialty that permits piercing the cap.

When Congress enacted the cap, it was clear that they thought the cap would limit the amount paid by the taxpayers in the broad run of EAJA cases. It turns out, because even though the Supreme Court tried to—by cabining it, I mean reduce the degree of ability to litigate exceptions to the cap. It didn't work, and despite the cap,

despite the Supreme Court decision, there are lots and lots of cases going every which way where the attorneys have been able to succeed in getting a greater attorney fee and fighting over how they can——

Mr. COHEN. We have gotten to the red light.

Mr. AXELRAD [continuing]. Pierce it.

Mr. COHEN. So, yes, thank you, sir.

Mr. COBLE. Thank you, Mr. Cohen. The gentleman from South Carolina, Mr. Gowdy, is recognized for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. Professor Wolfman, who decides whether the government position was substantially justified?

Mr. WOLFMAN. Either the court or the agency adjudicator, depending on whether it is an administrative case or a court case.

Mr. GOWDY. Who has the burden of proof?

Mr. WOLFMAN. The government has the burden to show its position was not substantially justified, but in practice that makes no difference because there is no factual determination, so burdens usually only matter when facts are at stake. It is a legal question.

Mr. GOWDY. Well, what is the standard of proof by which it must be proven?

Mr. WOLFMAN. A preponderance of the evidence, just like any other civil matter.

Mr. GOWDY. You mentioned a few moments ago the importance of having data, so I am hopeful you will have the data for this because I don't. The percentage of cases where plaintiffs prevailed but the court said the government's position was substantially justified?

Mr. WOLFMAN. That is an interesting question, and in the area of the Social Security and veterans cases, particularly veterans cases, it is very high that the—it usually doesn't even go to court, the agency typically settles.

Mr. GOWDY. What about environmental cases?

Mr. WOLFMAN. But in non-Social Security and veterans cases, I haven't done a study, so I am just—based on my experience, the government wins often. I cite just—what I did in my testimony is that I just said I am looking for cases in recent years in Courts of Appeals where the court found a reasonable——

Mr. GOWDY. No, I think you did a good job with anecdotal evidence. I was looking for statistical evidence.

Mr. WOLFMAN. I don't know of any study on that, I don't know of any study that—I know in the non-Social Security——

Mr. GOWDY. You do not know what percentage of time plaintiffs prevailed but still were not allowed to recoup fees because a finder of fact——

Mr. WOLFMAN. I do not. I don't know that anyone knows that. It would be, again, an interesting study. But I will say this, because I know it for a fact, is that in the non-Social Security and veterans areas, it is much higher than in those other areas.

Mr. GOWDY. You once, I believe, and I don't want to mischaracterize your positions because I didn't know you in 1994, but you once, I believe, supported the notion of doing away with the special factor exemption. Do you still support that?

Mr. WOLFMAN. What I said was at that time—and I would have to look back for sure—is that if we chose a more reasonable rate that could go up with inflation, actual fees in the real market, as opposed to what has occurred, yes, because——

Mr. GOWDY. Right. I think you said $175; if we go up to $175 we would do away with it.

Mr. WOLFMAN. Yes, but that—yes, but with all respect, that would not be the case.

Mr. GOWDY. I am just asking you if you said it, I am not asking if you meant it.

Mr. WOLFMAN. No, but with all respect that was $175 in 1994 dollars.

Mr. GOWDY. Two hundred fifty dollars.

Mr. WOLFMAN. That is correct, if we were at $250—

Mr. GOWDY. What if we went up to $250, would you do away with it then?

Mr. WOLFMAN. I think if we were at $250 an hour and we had a reasonable inflation adjuster, right——

Mr. GOWDY. We just adjusted for inflation, we just bumped it from $175 to $250.

Mr. WOLFMAN. Right. And if you had a mandatory reasonable inflation adjuster, I am with you on this.

Mr. GOWDY. Then you would be fine doing away with it?

Mr. WOLFMAN. I think that would be reasonable rather than necessarily what we have now. We have to appreciate that in the vast majority of the cases, the vast majority of the cases, what attorneys get and the clients get is the basic EAJA rate plus an inflation adjuster, except the agencies, which largely don't do any inflation adjustment.

Mr. GOWDY. All right, let me ask you this because I am running out of time quickly. I think you said there are 203 instances where we have something other than the American rule with respect to litigation in——

Mr. WOLFMAN. Someone else said 203. I know it is approximately 200, yes.

Mr. GOWDY. Are you an advocate for abolishing the American rule in all litigation and letting the finder of fact decide whether or not attorney——

Mr. WOLFMAN. Absolutely not. Absolutely not. I think if you had——

Mr. GOWDY. You hadn't heard my idea yet. Why don't we let the finder of fact decide whether or not litigation was frivolous or vexatious?

Mr. WOLFMAN. Well, I can answer your question if you will allow me.

Mr. GOWDY. I am going to. I just—I wanted to get my question out.

Mr. WOLFMAN. I think having essentially the rule in Great Britain would deny ordinary action.

Mr. GOWDY. That is not—what I just laid out is not Great Britain's rule. I didn't say loser pays. I said the finder of fact decides, the same group that we let decide capital cases, the same group that we let decide whether there is liability in a medical mal-

practice case or products case, let the finder of fact decide whether or not the lawsuit was frivolous or vexatious.

Mr. WOLFMAN. Well, first of all——

Mr. GOWDY. That is not the British rule, agreed?

Mr. WOLFMAN. That is correct.

Mr. GOWDY. Okay.

Mr. WOLFMAN. I didn't know that is what you were saying, but I will say two things about that. First of all, that is already the law in the sense that——

Mr. GOWDY. Well, wait a second. Can you name me a single time—how many times when summary judgment is granted or a motion to dismiss is granted does the judge then award attorneys fees for filing a frivolous lawsuit? In what percentage of the cases does that happen?

Mr. WOLFMAN. A very small percentage because there is not——

Mr. GOWDY. Well, then we don't have that rule.

Mr. WOLFMAN. Well—Excuse me?

Mr. GOWDY. Well, then we don't have the rule.

Mr. WOLFMAN. We do have that rule. With all respect, we do have that rule. Rule 11 applies in every piece of civil litigation.

Mr. GOWDY. How many times has it been enforced? In summary judgment cases and just for the viewer, that is where there is no dispute over fact, just the law, what percentage of time in summary judgment cases are sanctions administered for frivolous lawsuits?

Mr. WOLFMAN. Well, not often. But with all respect, I don't think that proves anything, because all that means is there are not that many frivolous cases on purely legal matters.

Mr. GOWDY. Well, then we don't need rule 11.

Mr. WOLFMAN. Huh?

Mr. GOWDY. Well, then we must not need rule 11 if there are no frivolous lawsuits.

Mr. WOLFMAN. I didn't say there were none. Rule 11 provides an important incentive. But let me give you the other reason why I think that would be a poor idea. If you decided fee shifting at the back end, right, if you decided frivolity at the back end only, and didn't have the 200 fee-shifters at the front end, you wouldn't have the encouragement that these fee-shifters provide at the front end to give litigants to enforce our important civil rights, environmental and consumer laws.

Mr. GOWDY. We lose an incentive to litigate, to bring a lawsuit, because there may be a penalty on the back end if you lose.

Mr. WOLFMAN. This is a debate that people can have. The Congress of the United States has decided that it is important on the front end in over 200 instances to provide that incentive.

Mr. GOWDY. You are right. And I am asking you if it is important in the rest of all the category of cases if it does well in these 200.

Mr. WOLFMAN. I think probably not. In my judgment it makes sense for the Congress to decide which types of litigation it wants to incentivize, and not do it on an across-the-board basis.

Mr. GOWDY. My time has expired. Thank you, Mr. Chairman.

Mr. COBLE. The distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Coble. I would like to start with Mrs. Ellis, please. Mrs. Ellis, have you ever used the legal services provided by a nonprofit?

Ms. ELLIS. No, sir.

Mr. CONYERS. So then you have never had the opportunity to take advantage of the Equal Access to Justice Act's fee provision?

Ms. ELLIS. No, sir.

Mr. CONYERS. All right. Thank you.

Now, for Mr. Baier. I am the one that sent you a list, Mr. Baier, of groups that have sent us notice that they strongly oppose Government Litigation Savings Act, H.R. 1996. Do you have that list in front of you?

Mr. BAIER. I do, Representative Conyers, yes.

Mr. CONYERS. Okay. Now, look on these 3—4 pages. I think you will find that there are 46—64, 65 organizations that are conservation organizations. I started noting them. The first I put a number one by, Alaska Wilderness League; and then number two, the Big Black Foot River Keeper; and number three, Butte Environmental Council. Do you see those? Do you see those numbers?

Mr. BAIER. I do.

Mr. CONYERS. Okay. And out of this over 100, 65 of them are environmental organizations. Now, take a look, just scan them. Do you recognize any of those organizations?

Mr. BAIER. Congressman Conyers, yes, I recognize a few of these, yes.

Mr. CONYERS. Sure. They have a position of opposition to this bill. Is there any possible rationale you could suggest for this many people that work in the same field that you do, or did work, in having so different a view from you about the bill that we are discussing today?

Mr. BAIER. I do, sir.

Mr. CONYERS. Please tell me what it is.

Mr. BAIER. Well, I note that some of our larger, more recognizable environmental groups in the country are on this list such as the Environmental Defense Fund. The Environmental Defense Fund—and Defenders of Wildlife are on here as well. Defenders of Wildlife have a net worth of $23.7 million.

Mr. CONYERS. Oh, that is terrible.

Mr. BAIER. And that would put them, make them ineligible under this bill. Others fall into that same category. For example, Earth Justice.

Mr. CONYERS. Okay, that is two. But we got 65.

Mr. BAIER. Well, I would have to analyze it, Congressman, to better respond.

Mr. CONYERS. I will give you that list to take home with you. And you send it back to me, the ones that you recognize. And if you think that you—I assume that you are saying because they have so much money they can afford to be against this bill.

Mr. BAIER. Well——

Mr. CONYERS. Is that the inference that I am to draw from your explaining to me how big and rich this group is?

Mr. BAIER. Well, if I understand your question, sir, some of the larger ones on this list have net worths—for example, the Humane Society of the United States has a net worth of $160 million.

Mr. CONYERS. Now, that is really bad. So what?

Mr. BAIER. Excuse me, I am sorry.

Mr. CONYERS. Yeah. I said, so what?

Mr. BAIER. Well, as I understand your question, you were wondering why they would oppose the bill.

Mr. CONYERS. Yes.

Mr. BAIER. And I would suggest, sir, because the bill would disqualify them from utilizing EAJA on procedural litigation.

Mr. CONYERS. But they were disqualified before this bill. They are disqualified now, aren't they?

Could I get 1 minute, Chairman Coble?

Mr. COBLE. Without objection.

Mr. CONYERS. Okay. I just want to get one question in to Professor Axelrad if I can. Is it not true, sir, that on pages 3 and 8, in the first section on page 3 and the top section on page 8, that both of these amounts—oh, well, this is the only bill we have got. Aren't these the two places that deny pro-bono fees to lawyers who win awards, and specifically in this bill on page 3, the top, and page 8?

Mr. AXELRAD. You are referring to page 3 of the bill?

Mr. CONYERS. I am.

Mr. AXELRAD. Your citations appear to be correct to me.

Mr. CONYERS. Yeah. Well, thank you. And you agree that this is the way you would want to go even though there are over 100 groups, and not all environmental, some just nonprofits, that think that this is a bill that should not advance beyond this Committee?

Mr. AXELRAD. I support the entire bill. I did not in my statement address the particular provision you are addressing now. I see the overall purpose of the bill as in keeping with the principle that the EAJA is an exception. It is a one-way, loser-pay provision in relevant part that doesn't otherwise exist. If a person who makes a claim for money or nonmonetary relief from the government and loses a claim, it doesn't matter whether the person had substantial justification or not, because the American public can't recover its costs in defending against that unsubstantial claim, whereas EAJA provides the opposite against the——

Mr. CONYERS. Do you know, sir, that you have to win the case before the attorney can get—she shakes her head no. You don't have to win? You can lose the case in claim fees?

Mr. AXELRAD. Many attorneys do not work on a contingency basis.

Mr. CONYERS. Well, on a pro-bono basis you can't work on a contingency. The client doesn't have any money.

Mr. AXELRAD. If someone is working on a pro-bono basis, they are working without an expectation of compensation. That to me is what the term "pro bono" means.

Mr. CONYERS. But that is exactly why we have this provision in the law, is that if a pro-bono lawyer takes the case and prevails, the court can award him legal fees. You object to that?

Mr. AXELRAD. I think that the—exceptions to the American rule that Congress created in EAJA should be narrowly confined. I have not specifically addressed this rule, but I favor the general principles that H.R. 1996 introduces.

Mr. CONYERS. Would you, Mr. Chairman, give me the time, 1 minute more, to ask the other witness?

Mr. COBLE. Without objection.

Mr. CONYERS. Thank you very much. Can you help us, sir, Mr. Wolfman, about who gets pro-bono fees and who doesn't under this rule and in the general practice of law in the United States?

Mr. WOLFMAN. So one of the things I think, thankfully, that has occurred in this country when lawyers are able to do it, is they provide their services to the poorest among us, the neediest, the people who are in the most difficult circumstances, on a pro-bono basis. It has always been the case that if there is a fee-shifting statute involved and the person prevails, and in the case of EAJA also the government's position is not substantially justified, it has always been the case that the pro-bono lawyer can have at least some prospect of and recovering a fee in that circumstance.

Mr. CONYERS. But if he wins.

Mr. WOLFMAN. This provision—yes. Not only do you have to win, but under EAJA you have to effectively show that the position of the government is not reasonable. But what this bill would do, among other things that I think are unfortunate, it specifically says that the court shall reduce or deny all fees to the extent commensurate with pro-bono hours. So the pro-bono lawyers, many of whom are in this very city, that are willing to take on a veterans case, a Social Security case, or other cases—I just use those two examples—on a pro-bono basis can't get fees under EAJA. It says that. I mean, I am not making this up. That is what the bill says.

Mr. COBLE. The gentleman's time has expired.

Mr. CONYERS. And I thank the Chairman for his generosity.

Mr. COBLE. You are indeed welcome.

We want to thank the witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made a part of the record. Without objection all Members will have 5 legislative days to submit any additional material for inclusion in the record.

[The information referred to follows:]

With that, again, I thank the witnesses and the hearing stands adjourned.

[Whereupon, at 4:50 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

Hearing on H.R. 1996, the "Government Savings Litigation Act," Before the Subcommittee on the Courts, Commercial and Administrative Law"

Tuesday, October 11, 2011, at 3:30 p.m.
2141 Rayburn House Office Building

During this Congress, instead of focusing on much-needed job creation, the majority has pushed a broad anti-regulatory message while championing its supposed efforts to support small businesses. In particular, this subcommittee has sought to give industry more opportunities to undermine proposed or existing rules.

But today, we hold a hearing on H.R. 1996, the "Government Savings Litigation Act," which seems to discourage those who want to challenge agency actions, including small businesses and non-profit organizations.

Specifically, the bill would amend the Equal Access to Justice Act to prohibit small businesses and others who have successfully prevailed in court against the government from recovering legal fees.

As such, this hearing and legislation seem to be pro-government-overreach and anti-small business.

Under the EAJA, individuals and small businesses can request reasonable attorneys fees if they are the prevailing party in a legal action against the government. The award, however, is not automatic.

If the government can show that its actions were "substantially justified," then the award is denied. This substantial justification defense prevents many awards and discourages frivolous or marginal cases that were filed based solely on the hope of recovering attorneys fees.

The EAJA also caps the fee rate at below market rates, except that a judge may award fees above the $125 cap if a specialized skill was necessary for the litigation. Still, the prevailing party must show that legal representation could not have been obtained at that capped rate but for the possibility of obtaining a higher rate.

This below-market-rate cap minimizes litigation and also discourages frivolous or marginal cases.

The current EAJA attorney fee provision strikes the right balance between allowing small entities the opportunity to challenge government action while preventing expensive and runaway litigation.

Still, even with the very slim chance of recovering attorneys fees, critics suggest that awards under the EAJA are astronomical and too common.

The criticism, however, is based on mere estimates of awards and pure conjecture about the frequency of awards, as there has been *no* comprehensive governmental study since 1998.

An updated study to reflect the current situation, rather than that of 13 years ago, would be a good government measure. This bill requires a report, which is laudable. Unfortunately, that is the only reasonable provision in this bill.

H.R. 1996 should concern all of us. It will negatively impact veterans, seniors, and our public health.

A 1998 GAO report found that in 1994, 98 percent of fee applications submitted and 87 percent of the dollars awarded under the EAJA were in social security disability cases and veterans disability cases.

Based on those numbers, this bill would prevent the awarding of fees disproportionately in cases brought by non-profit veterans groups challenging the VA for systemic delays. This discourages the filing of these cases and leaves it to individual veterans to bring the case. Most of these veterans cannot afford to do so.

Likewise, the bill would also discourage legal aid programs from bringing cases on behalf of senior citizens.

Further, because H.R. 1996 bars recovery of fees for most non-profits and citizen suits, it will discourage environmental groups from bringing actions to enforce environmental laws that protect our public health and lands.

In light of the impact on our veterans, seniors, and public health and lands, and many other concerns, various groups have expressed their opposition to this legislation.

They include the National Organization of Veterans' Advocates, Inc., the National Organization of Social Security Claimant's Representatives, the Natural Resources Defense Council, the National Legal Aid & Defender Association, the Center for Auto Safety, and the Center for Food Safety. There are dozens more.

I thank our witnesses for their participation in today's hearing and look forward to their testimony.

* Archery Trade Association * Association of Fish & Wildlife Association *
* Boone & Crockett Club * Bowhunting Preservation Alliance * Campfire Club of America *
* Catch-a-Dream Foundation * Congressional Sportsmen's Foundation * Dallas Safari Club *
* Delta Waterfowl * Houston Safari Club * Masters of Foxhounds * Mule Deer Foundation *
* National Association of Forest Service Retirees * National Rifle Association *
* National Shooting Sports Foundation * National Trappers Association *
* National Wild Turkey Federation * North American Bear Foundation *
* North American Grouse Partnership * Orion-the Hunters' Institute * Pheasants Forever *
* Pope and Young Club * Quality Deer Management Association * Quail Forever *
* Rocky Mountain Elk Foundation * Ruffed Grouse Society * Safari Club International *
*Theodore Roosevelt Conservation Partnership * Texas Wildlife Association *
* TreadLightly!* U.S. Sportsmen's Alliance * Wild Sheep Foundation *
* Wildlife Forever * Wildlife Management Institute *

June 14, 2011

Dear Congressional Sportsmen's Caucus Member:

The undersigned organizations, which collectively include millions of hunter and angler conservationists, encourage you to co-sponsor of the Government Litigation Savings Act which was introduced on May 25, 2011 by Representative Cynthia Lummis (H.R.1996).

Since 1995, there has been no reporting of the monies paid out by the federal government under either the Equal Access to Justice Act (EAJA) or the Judgment Fund. From preliminary research, we can account for over $42 million having been paid out in the 19 most active federal district and circuit courts over the last 9 years, which represents a fraction of the total money paid to plaintiff litigants who have sued our multiple land management agencies (U.S. Forest Service (USFS), U.S. Fish and Wildlife Service (USFWS), Bureau of Land Management (BLM), National Park Service (NPS), etc.) over issues related to the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Federal Land Policy Management Act (FLPMA), Clean Water Restoration Act (CWRA), the Marine Mammal Protection Act (MMPA), and many other environmental statues enacted in the 1970's. Twelve non-profit groups alone have filed over 3,300 law suits over the last decade. This constant barrage of litigation has drained our land management agencies of operating funds, and diverted the attention of agency personnel from their primary management mission to defending countless law suits.

The Government Litigation Savings Act will remove the eligibility exception 501(c)(3) organizations have enjoyed since 1980 when EAJA was initially passed, and put "equal" back into "access" as Congress originally intended. Henceforth non-profit organizations will be subject to the same rights, limitations, constraints and transparency that govern the utilization of EAJA by small business owners, veterans, social security recipients, taxpayers and all private citizens oppressed by overzealous regulatory enforcement, which was the Congressional intent underlying the enactment of EAJA in 1980.

Environmental and animal rights' activists have exploited a loop hole in EAJA, and through round-robin litigation supported their organizations and built large internal legal departments to sustain and perpetuate continuing litigation. The Government Litigation Savings Act will limit the use of EAJA to only those who can prove they have a direct and personal monetary or property interest, suffered personal injury, or are likely to suffer irreparable harm. Reimbursement of legal fees under EAJA will be curtailed if the claimant has unreasonably protracted the proceedings, been oppressive or acted in bad faith, or has utilized attorneys pro bono. Moreover, all attorneys' fees will be capped at $175 per hour, and limited to $200,000 for any single lawsuit, and no more than three EAJA awards in any calendar year can be awarded to the same claimant. All payments under EAJA shall be reported annually, and a searchable database created indentifying the amount and to whom the funds were paid (including sealed settlement agreements), the agency sued, hourly rates of expert witnesses and related costs, the names of presiding judges in each case, and their basis for finding the position of the agency concerned was not substantially justified. Lastly, a GAO report of EAJA payments since 1995 will be required under this reform legislation.

Passage of the Government Litigation Savings Act will restore order to our land management agencies' missions, and permit them to manage and conserve our wildlife, natural, scenic and cultural resources.

We encourage you to become a cosponsor of the Government Litigation Savings Act by contacting Pete Obermueller (5-2311) in the office of Representative Cynthia Lummis.

Thank you for your consideration of this request and for your service on behalf of America's hunting, shooting, fishing and conservation community.

Archery Trade Association
Association of Fish & Wildlife Association
Boone & Crockett Club
Bowhunting Preservation Alliance
Campfire Club of America
Catch-a-Dream Foundation
Congressional Sportsmen's Foundation
Dallas Safari Club
Delta Waterfowl
Houston Safari Club
Masters of Foxhounds
Mule Deer Foundation
National Association of Forest Service Retirees
National Rifle Association
National Shooting Sports Foundation
National Trappers Association
National Wild Turkey Federation
North American Bear Foundation
North American Grouse Partnership
Orion – The Hunters' Institute
Pheasants Forever
Pope and Young Club
Quality Deer Management Association
Quail Forever
Rocky Mountain Elk Foundation
Ruffed Grouse Society
Safari Club International
Theodore Roosevelt Conservation Partnership
Texas Wildlife Association
TreadLightly!
U.S. Sportsmen's Alliance
Wild Sheep Foundation
Wildlife Forever
Wildlife Management Institute

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)
1425 K Street, NW, Suite 350
Washington, DC 20005
202-587-5708
www.vetadvocates.com

October 10, 2011

By email and U.S. Mail

Howard Coble, Chairman
Stephen Ira Cohen, Ranking Minority Member
House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law
United States House of Representatives
517 Cannon House Office Building
Washington, DC 20515

Dear Chairman Coble and
Ranking Member Cohen:

Because it is likely to adversely affect veterans, NOVA cannot support, and does oppose, H.R. 1996, the Government Litigation Savings Act ("GLSA") as presently written.

Our objections are as follows:

28 USC § 2412(d)(1)(A)

The modification of 28 USC § 2412(d)(1)(A), contained in Section 2 of GLSA, is too restrictive when applied to appeals by veterans and their dependents. Thus, NOVA is concerned that the VA will argue that this statute was not intended to cover appeals of denial of VA benefits, hospital or medical benefits, the failure of the VA to timely adjudicate claims nor the failure of the VA to comply with requests for information.

For clarity, those sections would need to read something like this "who has a direct and personal monetary interest in the adjudication, and to access to government services or information from the government, including, but not limited to personal injury, property damage, denial of access to government records, denial of government benefits, or unpaid government disbursement.

28 USC § 2412(d)(1)(E)

The addition of 28 USC § 2412(d)(1)(E), contained in Section 2 of GLSA, as written, could prevent an attorney, a Veterans' Service Organization or NOVA from receiving EAJA fees for representing veterans or veterans' issues in 4 appeals

in one year. To clarify the intent to prevent a party from receiving multiple EAJA fees per year, the terms "individual" or "entity" should be changed to read "party", in that section.

28 USC § 2412(d)(2)(A)(ii)

The modification of 28 USC § 2412(d)(2)(A)(ii), in Section 2 of GLSA, has the potential to hurt veterans because it would lower the effective rate of EAJA compensation. For example, veterans residing in the North East of the country would have their award reduced from the May 2010 rate of $184 to $175, thus lowering the offset which is applied to statutory attorney fees. In addition, the modification is objectionable because it does not contemplate automatic increases to correspond to the regular increases in the cost of living.

28 USC § 2412(d)(2)(B)

The modification of 28 USC § 2412(d)(2)(B), in Section 2 of GLSA, is objectionable because it would likely prevent some Veterans' Service Organization from receiving EAJA fees when they file suit to challenge VA rule making or the failure of the VA to take action.

28 USC § 2412(d)(1)(C)

The modification of 28 USC § 2412(d)(1)(C) would likely place a chilling restriction on veterans' appeals. Veterans might risk losing EAJA fees if they request reversal or a remand based on multiple errors where the government seeks to confess error based on a very narrow issue. For that reason, any language dealing with delay and, specifically language dealing with dilatory conduct should be eliminated.

Sincerely,

Richard Paul Cohen
Executive Director

Providing representation to veterans and their dependents since 1993

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October 11, 2011

The Honorable Howard Coble
Chairman
Subcommittee on Courts, Commercial
and Administrative Law
U.S. House of Representatives
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Courts, Commercial
and Administrative Law
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Coble,

I am writing you today to express the support of Colorado Farm Bureau for H.R. 1996, the Government Litigation Savings Act and applaud you for holding this hearing.

As the state's largest agriculture grassroots organization, Colorado Farm Bureau's reason for supporting H.R. 1996 is simple. The legislation prevents abuse of the Equal Access to Justice Act (EAJA) by large environmental groups and others who frequently challenge the federal government in court.

H.R. 1996 would limit EAJA abuse in four ways. H.R. 1996 would award fees to only those prevailing parties with a direct interest in the case, it reduces the amount of fees collected in relation to pro bono hours, it limits awards to not more than $200,000 for any single entity and it expands the reporting requirements regarding fees and other expenses awarded to prevailing parties.

Many of the lawsuits filed by these large environmental groups have been related to the multiple-use concept of federal lands. Many of Colorado Farm Bureau's members rely on federal lands for livestock grazing and these lawsuits threaten their livelihood and the viability of their local economies. Even when Colorado Farm Bureau joins with others adversely affected in counter lawsuits, we find ourselves facing the deep pockets of environmental groups whose legal departments are bolstered with federal government money. In order to return balance and fairness to the federal litigation system, we would urge support for H.R. 1996, the Government Litigation Savings Act.

Sincerely,

Donald J. Shawcroft

Don Shawcroft
President-Colorado Farm Bureau

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October 11, 2011

The Honorable Howard Coble
Chairman, Subcommittee on Courts, Commercial and Administrative Law
US House of Representatives
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member, Subcommittee on Courts, Commercial & Administrative Law
US House of Representatives
Washington, DC 20515

RE: HR 1996, Government Litigation Savings Act

Dear Chairman Coble and Ranking Member Cohen:

This letter is regarding your Subcommittee's hearing on October 11, 2011, on HR 1996, the "Government Litigation Savings Act." As an expert on the enforcement of environmental laws, I write to oppose this bill. By eliminating the ability of citizens to collect attorney fees under the Equal Access to Justice Act when they prevail in cases in which they act to protect the public interest, rather than merely their own, GLSA would gut the very foundations of many of our environmental and resource laws and other public interest laws, making it much more likely that Americans would be exposed to dangerous pollutants and an impaired environment.

My name is Victor B. Flatt and I am the Tom & Elizabeth Taft Distinguished Professor of Environmental Law, and the Director of the Center for Law, Environment, Adaptation, and Resources (CLEAR) at the University of North Carolina-Chapel Hill School of Law. I have been teaching and writing full time about environmental law since 1993. In particular, I specialize in the enforcement of environmental laws, that is, how environmental legal requirements are actually followed in the real world. I have published numerous articles in many respected law reviews, including the Notre Dame Law Review, Northwestern Law Review, Ecology Law Quarterly, and many others. Six of my articles have been selected as finalists or winners in the best environmental law articles of the year annual compendium. My research in

this area has demonstrated conclusively the importance of citizen suits to the functioning of environmental laws, and the importance of prevailing party fees under the Equal Access to Justice Provisions for the effective functioning of these citizen suits.

When the suite of modern environmental laws were passed in the 1970s, some contained so-called "citizen suit" provisions. These citizen suit provisions were carefully thought out and considered and were placed in the Acts to be deployed in the situations in which either the federal or state government failed to enforce the law properly. By their own terms, citizens cannot pursue these "citizen suits" compelling the government to act, if the state or federal government itself proceeds to enforce the relevant law.

The drafters of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Acts believed that the citizen suit provisions would be useless unless fees were provided for prevailing parties. (Former Senator Ed Muskie wrote about this in comments in 1990). Thanks to the EAJA provisions, fees can also be received for environmental prevailing parties in environmental cases involving statutes that do not have their own fee shifting and citizen suit provisions (such as the National Environmental Policy Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Federal Land Planning and Management Act), or in cases in which the challenge is brought outside of the permit structure of an Act, such as a CAA challenge that proceeds through the APA because the subject matter is outside of the CAA's own citizen suit provision.

In an article from 1998 entitled "A Dirty River Runs Through It: The Failure of Enforcement in the Clean Water Act," 25 Boston College Environmental Affairs Law Rev. 1 (Silver Anniversary edition 1998), I was able to empirically demonstrate that the assumption that states would uniformly enforce required environmental compliance was not true. This demonstrated the critical importance of citizen suits to prod state and federal authorities to require compliance with the law. In fact, even with the citizen suits, this article suggested that states still lagged in implementing "effective" enforcement, indicating that they would not enforce at all if not for the pressure of these citizen suits. Similarly, in 2009's "Environmental Enforcement in Dire Straits," 85 Notre Dame L. Rev. 55 (2009), I was able to demonstrate that in at least some cases, state enforcement was dependent on funding, which shows that enforcement of environmental laws may be one of the first things to go when budgets are tight. Again, without the possibility of citizen suits in the environmental laws, many states would have even less incentive and ability to adequately enforce these laws.

If the term "prevailing plaintiffs" is amended to exclude those who sue to protect interests in the public health and environment instead of their own monetary or property interests, general environmental protections outside of certain situations in specific statutes will become impossible. Without the possibility of receiving fees, the citizen challenges to improper government action on environment and the public health would become meaningless. One person on her own will not pay for the litigation necessary to ensure environmental and public

health values are preserved. This is a classic "commons" problem wherein everyone would be better off if the laws were followed, but no individual has enough of an incentive to pay for it. As stated by Steven and Jonathan Fischbach in the BYU Journal of Public Law, Vol. 19, 317, 332 (2005) "fee-shifting provisions encourage plaintiffs to act …[in ways that serve] the public interest."

Therefore, the passage of the GLSA would essentially eliminate many safeguards to ensure that our environment and public health are being protected, as well as other situations in which the public interest (as opposed to private interests) are not being served. While specific fee-shifting provisions would remain in place in some situations in some laws, many environmental and resource laws would be gutted altogether. If paying for citizens to defend the rights of us all to public and environmental health is seen as a budget problem, that problem is better solved by the federal and state governments doing their job properly than by eliminating any real possibility of citizen suit enforcement when they do not.

I strongly urge you to not pass the provisions in this bill eliminating attorney fees for all prevailing parties. Without these provisions, our public health and environment will be at serious risk. I am happy to answer any questions you may have.

Very truly yours,

Victor B. Flatt
Tom & Elizabeth Taft Distinguished Professor of Environmental Law
Director, Center for Law, Environment, Adaptation and Resources (CLEAR)
University of North Carolina School of Law
flatt@email.unc.edu

October 11, 2011

The Honorable Howard Coble
Chair, Subcommittee on Courts, Commercial and Administrative Law
2188 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member, Subcommittee on Courts, Commercial and Administrative Law
1005 Longworth House Office Building
Washington, DC 20515

RE: Support for H.R. 1996, the Government Litigation Savings Act

Dear Chairman Coble and Ranking Member Cohen:

The undersigned livestock organizations strongly support H.R. 1996, the "Government Litigation Savings Act." This bill would bring transparency and accountability to a flawed system that has led to the abuse of taxpayer dollars—and of countless farmers and ranchers who have had to defend their way of life against tax dollar-funded assaults by radical environmental groups. While we respect the original intent of the Equal Access to Justice Act (EAJA)—a leveled playing field between individual citizens and the powerful federal government—it has become a source of revenue for interest groups intent on removing grazing and other multiple uses from public lands.

More specifically, EAJA has become a means for wealthy radical environmental groups to obtain federal funding to target ranchers by challenging federal land management agencies in court (primarily on minor process decisions), all to curtail natural resource uses such as livestock grazing. As a result, our members are forced to pay multiple times over to defend themselves: on the one hand, they pay attorney fees as interveners in defense of the federal government; on the other hand, as hard working citizens, their tax dollars go toward agency operations budgets, and toward filling the pockets of these vastly wealthy environmental groups with EAJA funds. H.R. 1996 would prevent organizations whose net worth exceeds $7 million from filing for EAJA payments, require that EAJA filers show a "direct and personal monetary interest" in the action to be eligible for payments, and limit the number of annual reimbursements and amount a filer may receive. It would also cap the exorbitant attorney fees these groups claim to be owed, which are often in excess of $300 per hour. These and other measures of the Government Litigation Savings Act will help protect our members from the injustice of funding their own demise.

Additionally, H.R. 1996 would require oversight and reporting of EAJA payments, as well as a Government Accountability Office audit of EAJA payments over the past 15 years. According to attorney Karen Budd-Falen of Cheyenne, Wyoming, 12 environmental groups alone have filed more than 3,300 lawsuits over the past decade, recovering over $37 million in EAJA funds. Budd-Falen says that this is a conservative estimate, as accounting of EAJA expenditures has been scant, at best. This legislation will ensure that Congress and the American people are cognizant of how much we have spent and continue to spend on EAJA payments—and who collects them. During a time when federal spending and debt is skyrocketing, such accounting measures should be a minimum.

Likewise, during a time of economic hardship such as we face today, we must make every effort to thwart radical activists' attempts at harming our producers' livelihoods. Responsible resource use is a tradition ranchers are obligated to live by if they are to continue successful operations that provide the country and world with food and fiber. EAJA payments are not encouraging conservation or wise resource use; they are encouraging destructive behavior on the parts of powerful special interest groups.

We appreciate your recognition of the importance of this issue and look forward to a productive hearing.

Sincerely,

Public Lands Council
American Sheep Industry Association
Association of National Grasslands
National Cattlemen's Beef Association

Arizona Cattle Growers' Association
Arizona Public Lands Council
California Cattlemen's Association
California Wool Growers Association
Central Committee of Nevada State Grazing Boards
Colorado Cattlemen's Association
Colorado Livestock Association
Colorado Public Lands Council
Colorado Wool Growers Association
Nevada Cattlemen's Association
Florida Cattlemen's Association
Georgia Cattlemen's Association
Hawaii Cattlemen's Council
Idaho Cattle Association
Idaho Wool Growers Association
Iowa Cattlemen's Association
Kansas Livestock Association
Minnesota State Cattlemen's Association
Montana Association of State Grazing Districts
Montana Public Lands Council
Montana Stockgrowers Association
Montana Wool Growers Association
Nevada Cattlemen's Association
New Mexico Cattle Growers' Association
New Mexico Wool Growers, Inc.
North Dakota Stockmen's Association
Oklahoma Cattlemen's Association
Oregon Cattlemen's Association
Pennsylvania Cattlemen's Association
South Dakota Cattlemen's Association
Texas Cattle Feeders Association
Utah Cattlemen's Association
Utah Wool Growers Association
Washington Cattlemen's Association
Wyoming Stock Growers Association

Cc: Subcommittee Members Trey Gowdy, Elton Gallegly, Trent Franks, Tom Reed, Dennis Ross, Hank Johnson, Melvin Watt, Mike Quigley

AMA
AMERICAN MOTORCYCLIST ASSOCIATION

101 Constitution Avenue NW, Suite 600W, Washington, DC 20001
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AmericanMotorcyclist.com

October 11, 2011

The Honorable Howard Coble
Chairman
Subcommittee on Courts, Commercial
and Administrative Law
U.S. House of Representatives
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Courts,
Commercial and Administrative Law
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Coble and Ranking Member Cohen:

The American Motorcyclist Association (AMA) and its partner organization, the All-Terrain Vehicle Association (ATVA) applaud the U.S. House Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary for holding the legislative hearing on H.R. 1996, the "Government Litigation Savings Act."

Founded in 1924, the AMA is the premier advocate of the motorcycling community, representing the interests of millions of on- and off-highway motorcyclists. Our mission is to promote the motorcycle lifestyle and protect the future of motorcycling.

Our Associations support H.R. 1996 because it prevents abuse of the Equal Access to Justice Act (EAJA) by groups who frequently challenge the federal government in court. This bill will return EAJA to its original intent by instituting targeted reforms on who is eligible to receive EAJA reimbursements, limit repeated lawsuits, and reinstate tracking and reporting requirements to make EAJA more transparent.

The lack of transparency and oversight has led to the EAJA program being abused by environmental groups using taxpayer funds to file lawsuits. These lawsuits ultimately lead to restricting responsible motorized access to public lands.

Again, the AMA and ATVA thank you and the Subcommittee for holding today's hearing on H.R. 1996, the "Government Litigation Savings Act."

Sincerely,

Dr. Wayne Allard, DVM
Vice President, Government Relations

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, EDUCATION

SUBCOMMITTEE ON INTERIOR AND ENVIRONMENT

SUBCOMMITTEE ON AGRICULTURE VICE-CHAIRMAN

Cynthia M. Lummis
Congress of the United States
Wyoming

WESTERN CAUCUS COMMUNICATIONS CHAIRMAN

WOMEN'S CAUCUS CO-CHAIRMAN

2ND AMENDMENT TASK FORCE

10TH AMENDMENT TASK FORCE

REPUBLICAN STUDY COMMITTEE

October 25, 2011

The Honorable Howard Coble
Chairman
Committee on the Judiciary, Subcommittee on
Courts, Commercial and Administrative Law
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Coble,

In the wake of the hearing on October 11th on H.R. 1996, the Government Litigation Savings Act, I wanted to take the opportunity to thank you for your leadership. I also wish to provide you with the following list of national, regional, and state organizations that have indicated to my office their endorsement of H.R. 1996. These groups, which number over 100, represent conservation, sportsmen, agriculture, recreational vehicle, state and county governments, and energy groups.

National Groups:
Boone and Crockett Club; National Rifle Association; Association of Fish and Wildlife Agencies; National Federation of Independent Businesses; Public Lands Council; National Cattlemen's Beef Association; National Association of Conservation Districts; Congressional Sportsmen's Foundation; National Rural Electric Cooperative Association; National Council of Farmer Cooperatives; Safari Club International; Western Energy Alliance; National Mining Association; United States Cattleman's Association; American Sheep Industry; National Association of Forest Service Retirees; Theodore Roosevelt Conservation Partnership; Recreational Off-Highway Vehicle Association; Motorcycle Industry Council; Americans for Responsible Recreational Access; Specialty Vehicle Institute of America; American Agri-Women; Mule Deer Foundation; Rocky Mountain Elk Foundation; Independent Petroleum Association of America; Foundation for Environmental and Economic Progress; Women in Farm Economics; National Trappers Association; Pheasants Forever/Quail Forever; Big Game Forever; U.S. Sportsmen's Alliance; Wildlife Forever; Wildlife Management Institute; Archery Trade Association; Campfire Club of America; Catch-a-Dream Foundation; Masters of Foxhounds Association of America; Orion-the-Hunter's Institute; Quality Deer Management Association; Ruffed Grouse Society; Tread Lightly!; Pope and Young Club; Association of National Grasslands; Specialty Equipment Market Association; BlueRibbon Coalition; National Association of Counties; American Motorcyclist Association; American Council of Snowmobile Associations.

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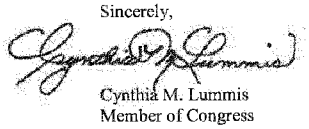
Regional or State Groups:
Western Legacy Alliance; Western Business Roundtable; Intermountain Forestry Association; Wyoming Stock Growers Association; Black Hills Forest Resource Association; Wyoming Wool Growers Association; Colorado Timber Industry Association; Colorado Farm Bureau Federation; Wyoming Farm Bureau Federation; Idaho Farm Bureau Federation; Wyoming Association of Conservation Districts; Wyoming County Commissioners Association; South Dakota Cattlemen's Association; Wyoming Mining Association; Wyoming Petroleum Association; Independent Cattlemen's Association of Texas; Dallas Safari Club; Houston Safari Club; Delta Waterfowl Foundation; Texas Wildlife Association; Texas Cattle Feeders Association; Oregonians for Food and Shelter; Oregon Farm Bureau Federation; Oregon Cattlemen's Association; Associated Oregon Loggers, Inc; Oregon Seed Council; Northwest Food Producers Association; New Mexico Cattle Growers' Association; New Mexico Wool Growers, Inc.; Arizona Farm Bureau Federation; Arizona Cattle Growers' Association; Arizona Public Lands Council; California Cattlemen's Association; California Wool Growers Association; Central Committee of Nevada State Grazing Boards; Nevada Cattlemen's Association; Colorado Cattlemen's Association; Colorado Public Lands Council; Colorado Wool Growers Association; Florida Cattlemen's Association; Georgia Cattlemen's Association; Hawaii Cattlemen's Association; Idaho Cattle Association; Idaho Wool Growers Association; Iowa Cattlemen's Association; Kansas Livestock Association; Minnesota State Cattlemen's Association; Montana Association of State Grazing Districts; Montana Public Lands Council; Montana Stockgrowers Association; Montana Wool Growers Association; Montana Farm Bureau; North Dakota Stockmen's Association; Oklahoma Cattlemen's Association; Utah Cattlemen's Association; Utah Farm Bureau Federation; Washington Cattlemen's Association; Great Lakes Timber Professionals Association

I look forward to working with you to further improve the legislation.

Sincerely,



Cynthia M. Lummis
Member of Congress

FOUNDED IN 1887 BY THEODORE ROOSEVELT

BOONE AND CROCKETT CLUB

LOWELL E. BAIER
PRESIDENT EMERITUS

November 7, 2011

The Honorable John Conyers, Jr.
2426 Rayburn House Office Building
Washington, DC 20515

RE: October 11, 2011 Hearing on the Courts, Commercial and Administrative Law Subcommittee on H.R.1996, *Government Litigation Savings Act*

Dear Representative Conyers:

During the referenced hearing you provided me a four page list of 133 organizations represented as opposed to the referenced bill. You then asked me to respond in writing to the following two questions:

1. Do you recognize any of those organizations?
2. Is there any possible rationale you could suggest for this many people that work in the same field that you do or did work in having so different a view from you about the bill that we're discussing today?

The answer to your first question is that I recognize the following organizations: American Civil Liberties Union; Center for Biological Diversity; Defenders of Wildlife; EarthJustice; Environmental Defense Fund; Friends of the Earth; Greenpeace; Natural Resources Defense Council; Oregon Wild; Western Watersheds Project; WildEarth Guardians; and Wyoming Outdoors Council.

As to your second question, the rationale most likely to explain the different views regarding H.R. 1996 is based on the differing opinions in this community regarding litigation. In one view, lawsuits serve the sole purpose of enforcing substantive provisions of environmental laws. In the other view, lawsuits are also a form of protest against lawful decisions with which a group disagrees. Protest suits usually concern the complicated procedures in reaching science-based decisions instead of actual outcomes that follow decisions. These views are at odds in H.R. 1996 because the bill would stop reimbursing legal fees incurred in bringing procedural lawsuits in protest of decisions.

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Please note: nothing here stops these lawsuits – H.R. 1996 only stops reimbursing legal fees for them to organizations with a net worth in excess of $7 million. Please note further: H.R. 1996 would not stop fee-reimbursements authorized under environmental laws, which provide fees for lawsuits enforcing substantive provisions or compelling required duties.

Thus, some groups will oppose H.R. 1996 because they want to collect legal fees for both types of suits, but the bill limits reimbursements for procedural suits. For those advocates that continue to use procedural claims to force the remanding of decisions they dislike, no public funds should apply as they are acting in their private interests. Groups supporting H.R. 1996 are confident that true threats to the public interest are, first of all, unlikely under the expert professionalism of the agencies; secondly, subject to recourse through appeals to the agencies themselves. Lastly, should threats arise for any reason, they will materialize in failure to enforce an environmental law or to act under it, and will therefore be actionable under environmental laws, which also reimburse fees.

The Boone and Crockett Club and our like-minded groups support H.R. 1996 also because protest suits are degrading the effectiveness of land management, wildlife, and environmental agencies. Such litigation delays the benefits of a decision often without changing the substance of the decision. The high likelihood of these suits distracts personnel during the decision-making process away from the substance in favor of preoccupation with process trying to anticipate procedural stratagems. Remanded decisions faulted only for process then require review and reissuance. The costs and staff time involved in pondering, defending, and re-doing entire processes is better spent implementing decisions and adapting them based on results and ever-evolving science and policy goals.

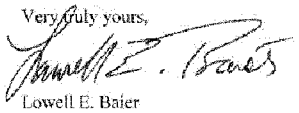
In taking care to limit fees modestly, H.R. 1996 applies limits reimbursement to organizations with a net worth up to $7 million. Six of the larger groups on your list exceed this limit and accordingly would be excluded from claiming legal fee-reimbursements under EAJA, which also may explain their particular opposition to this bill. Under H.R. 1996, they would have to finance their own lawsuits following the American Rule, just like any other organization with a net worth over $7 million. Naturally, they raise money for this purpose under their tax exemption to support in-house lawyers. With these resources and tax exemption they differ entirely from the retirees, veterans, and small businesses for whom EAJA is intended. And, again, for substantive cases brought by groups of any size, they remain eligible for fee-reimbursement under the Endangered Species Act, the Clean Air Act, and the Clean Water Act, each of which specifically provide for the court to award attorneys' fees.

In closing, our support for H.R. 1996 is carefully aimed at improving conservation while standing by Social Security recipients such as the elderly, widowers, widows and orphans, etc., and our cherished veterans, private citizens and our small business community oppressed by agency mistakes and overzealous regulatory agencies. It was for these groups that EAJA was enacted because they can least afford to protect themselves. It was for safeguarding the environment that specific environmental laws

were enacted to provide fee-reimbursements in the public interest. H.R.1996 provides for both purposes by leaving environmental law as is and applying a standard under EAJA that puts "equal" back into Equal Access to Justice.

Thank you for the opportunity to respond. I hope this clarifies the issues and resolves your concerns. I hope to work with you and your staff to reach agreement on this important matter.

Very truly yours,



Lowell E. Baier

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